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IN THE SUPREME COURT OF THE UNITED STATES

NO. 77-823

OCTOBER TERM, 1977

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PATRICIA ANNE SHEPLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF OREN D. SHEPLER, DECEASED,
PLAINTIFF-RESPONDENT,

v.

WEYERHAEUSER COMPANY, A WASHINGTON CORPORATION,
DEFENDANT-APPELLANT-PETITIONER,

and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,
DEFENDANT-RESPONDENT.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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TABLE OF CONTENTS

PETITION


| | Page |
|---|---|
| Opinions Below..... | 2 |
| Jurisdiction..... | 6 |
| Questions Presented for Review.. | 6 |
| Statutory Provisions Involved... | 7 |
| Statement of the Case | |
| A. Statement of Facts..... | 8 |
| 1. Weyerhaeuser employs an expert stevedore to load the vessel..... | 8 |
| 2. The Longshoremen chose to "dead-end" the logs.. | 12 |
| 3. The Accident..... | 15 |
| 4. No one told Weyerhaeuser that "bull winches" would improve safety.... | 17 |
| B. Basis for Federal Jurisdiction..... | 22 |
| Reasons for Allowing Writ..... | 22 |
| Summary of Argument..... | 22 |

Argument

I. Shipowner's Standard of Care.. 26

A. The 1972 Amendments: Legislative History and Meaning.... 26

B. The Charterer is not Liable for injuries caused by open and obvious conditions..... 29

C. The Charterer does not owe any duty to provide a safe place to work..... 32

D. The Oregon Supreme Court improperly rejected Restatement §§ 343, 343A because these sections allegedly embody "Assumption of the Risk" factors and unfairly favor the landlord..... 35

(1) Assumption of Risk - the forbidden phrase..... 36

(2) Are landowners a favored class..... 39

(3) Restatement §§ 409-429, which envision indemnity from the causative agent, do not apply under the 1972 Amendments which prevent the shipowner or charterer from securing indemnity from the negligent stevedore..... 39



E. The Oregon Supreme Court standard not only does not govern maritime negligence cases arising under the 1972 Amendments but also ignores the undisputed facts of this case..... 41

II. Equitable Credit..... 45

Conclusion..... 49

APPENDIX

A. Special Interrogatories..... A-1

Judgment Order..... A-3

B. Opinion of the Supreme Court of the State of Oregon A-6

Letter from Supreme Court of the State of Oregon Amending its Opinion..... A-82

C. Article III, § 2, cl. 1 of the United States Constitution..... A-84

28 U.S.C. § 1257(3)..... A-85

28 U.S.C. § 2101(c)..... A-85

D. 33 U.S.C. § 905(b)..... A-87

E. Restatement § 343..... A-88

Restatement § 343A..... A-89

F. Equitable Credit Comments... A-90

INDEX OF AUTHORITIES

Cases


| | Page |
|---|---|
| Alaska SS Co. v. Peterson, 347 U.S. 396 (1954) | A-40 |
| Albanese v. Matts, 382 U.S. 283 (1965) | A-39 |
| A.N.G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962) | A-39 |
| Anuszewski v. Dynamic Mariners Corp. Panama, 391 F. Supp. 1143 (D. Md. 1975), aff'd, 540 F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098, 97 S. Ct. 1116, 51 L. Ed.2d 545 (1977) | 30 |
| Arthur v. Parish, 15 Or. 582, 47 P.2d 682 (1935) | A-78 |
| Askew v. Howard-Cooper Corp., 263 Or. 184, 502 P.2d 210 (1972) | 37 |
| Beemer v. Lenske, 241 Or. 47, 402 P.2d 90 (1965) | A-78,A-79 |
| Bess v. Agromar Line, 518 F.2d 854 (3d Cir. 1976) | 33 |
| Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (D. Or. 1974) | 26 |
| Blassingill v. Waterman SS Corp., 336 F.2d 367 (9th Cir. 1964) | A-39,A-40 |
| Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977) | 31 |
| Bovia v. S/S Agia Erini, 433 F. Supp. 1020 (E.D. La. 1977) | 34 |
| Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977), rehearing denied June 8, 1977 | 32,34 |
| Butler v. O/Y Finnlines, Ltd., 537 F.2d 1205 (4th Cir. 1976) (appeal pending) | 33 |




INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| Citizen v. M/V TRITON, 384 F. Supp. 198 (E.D. Tex. 1974) | 33 |
| Croshaw v. Koninklijke, Nedlloyd, B. V. Rijswijk, 398 F. Supp. 1224 (D. Or. 1975) | A-29,A-70, A-75,A-91 |
| Crumedy v. The J. H. Fisser, 358 U.S. 423 (1958) | A-39 |
| Cummings v. "SIDARMA" Soc., 409 F. Supp. 869 (E.D. La. 1976) | 31 |
| Denneny v. Siegel, 407 F.2d 433 (3d Cir. 1969) | A-18 |
| Dodge v. Mitsui Shintaku Ginko K.K. Toyko, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed.2d 188 (1976) | 24,46 |
| Edmonds v. Compagne Generale Transatlantique, 558 F.2d 186 (4th Cir. 1977) (rehearing en banc granted June 3, 1977, argued October 6, 1977) | 24,46, A-76,A-77 |
| Erie R. Co. v. Tompkins, 304 U.S. 64 (1937) | A-83 |
| Fedison v. Vessel WISLICA, 382 F. Supp. 4 (E.D. La. 1974) | 30,32 |
| Fitzgerald v. Compania Naviera La Molinera, 394 F. Supp. 413 (E.D. La. 1975) | 33 |
| Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 109 (D. Md. 1975) | 33 |
| Gallardo v. Westfal-Larsen, 1977 A.M.C. 1325 (N.C. Cal. 1977) | 42 |
| Gautret v. Edgerton (1867) L.R. 2 C.P. 371 | A-48 |
| Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233 (5th Cir. 1977), rehearing denied 549 F.2d 203 (5th Cir. 1977) | 29,32 |

INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| Heaven v. Pender, 11 Q.B.D. 503 (1883) | 42,A-61 |
| Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977) | 31,43 |
| Hite v. Maritime Overseas Corp., 380 F. Supp. 222 (E.D. Tex. 1974) [see also 375 F. Supp. 233 (E.D. Tex. 1974)] | 30,31,32 |
| Hurst v. Triad, 554 F.2d 1237 (3rd Cir. 1977), appeal pending | 36,A-52,A-5 |
| Indermaur v. Dames (1866) L.R. 1 C.P. 274 | A-48 |
| Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1963) | A-40 |
| Jacobs v. Tidewater Barge Lines, 277 Or. 809, 562 P.2d 545 (1977) | A-19,A-34 |
| Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (1977). | A-83 |
| Johnson v. Clark Equipment Co., 274 Or. 403, 547 P.2d 132 (1976) | 38 |
| Johnson v. Zenith Navigation, ____ F. Supp. ____ (No. 74-1502) (E.D. La. 1975) | 33 |
| Kelleher v. Empresa Hondurena de Vapores S.A., 57 Cal. App.3d 52, 129 Cal. Rptr. 32 (1976) | 40 |
| Lloyd Westcott v. Empresas Armadores, S.A. Panama, et al, ____ F.2d ____ (9th Cir. No. 76-1611, decided November 14, 1977) | 30,34,35 |
| Lucas v. "BRINKNES" Shiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1974), appeal dismissed 387 F. Supp. 440 (3d Cir. 1975) | 26,27,32 |
| Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977) | A-18,A-92 |




INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| Miles v. Shell Oil Company, 498 F.2d 105 (5th Cir. 1974) | 30 |
| Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) | A-29 |
| Munoz v. Flota Merchante Grancolombiana S.A., 553 F.2d 837 (2d Cir. 1977) | 34,43 A-56,A-57 |
| Myers v. Cessna Aircraft, 550 F.2d 142 (3rd Cir. 1977) | A-19 |
| Napoli v. [Transpacific Carriers, Etc.] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976) | 31,A-57 |
| Newman v. Utility Trailer, 278 Or. 395, 564 P.2d 674 (1977) | 44 |
| Parker v. Costa Amatori S.P.A., ____ F. Supp. ____ (No. 74-454-N, E.D. Va. 1975) | 32 |
| Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953) | 29 |
| Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974) | 33 |
| Reinan v. Pacific Motor Trucking Co., 270 Or. 208, 257 P.2d 256 (1974) | A-80,A-81 |
| Robinson v. Dixie Machine W & M Works, et al., 1975 A.M.C. 2114 (E.D. La. 1975) | 33 |
| Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977) | 34,43 |
| Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956) | A-30 |
| Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) | A-29 |
| Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936, 96 S. Ct. 1668, 48 L. Ed.2d 177 (1976) | 24,25,46, 56,A-76 |

INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| Skibinski v. Waterman SS Corp., 360 F.2d 539 (2d Cir. 1966)..... | A-39 |
| Slaughter v. RONDE, 390 F. Supp. 637 (S.D. Ga. 1974); aff'd, 509 F.2d 973 (5th Cir. 1975)..... | 32,33 |
| Sloan v. Deniz Nakliyatin, 1975 A.M.C. 236 (Fla. Cir. Ct. 1974). | 30 |
| Southern Pacific v. Jensen, 244 U. S. 205 (1917)..... | A-50 |
| Strandholm v. General Const. Co., 235 Or. 145, 382 P.2d 843 (1963) | A-79 |
| Stranahan v. A/S Atlantica & Tinfos Papirfabrik, 471 F.2d 369 (9th Cir. 1973), cert. denied 412 U.S. 906, 93 S. Ct. 2293, 36 L. Ed.2d 971 (1973).... | 27 |
| Stillwell v. S.I.A.C., 243 Or. 158, 411 P.2d 1015 (1966)..... | A-79 |
| Streatch v. Associated Container Transp. Ltd., 388 F. Supp. 935 (D. Cal. C.D. 1975)..... | A-33 |
| Teofilovich v. D'Amico Medit./ Pacific Line, 1976 A.M.C. 1621, ____ F. Supp. ____ (C.D. Cal. 1976)..... | 40 |
| Thad Higgins v. Flota Mercante Grancolombia, ____ F. Supp. ____ [74 Cir. 5510 (C.C.M.)] (S.D. N.Y. April 15, 1976)..... | 32 |
| "The Lottawanna," 21 Wall, 558 (1874)..... | A-50 |
| The Osceola, 189 U.S. 85 (1946)... | A-29 |
| Valle v. Jugoslavenska Linejska Plovidba, 434 F. Supp. 608 (S.D. N.Y. 1977)..... | 31 |
| Vega v. Pan Am. Fruit Co., 1975 A.M.C. 187 (S.D. N.Y. 1974)..... | 33 |
| West v. United States, 361 U.S. 118, 80 S. Ct. 188, 4 L. Ed.2d 161 (1959)..... | 27 |




INDEX OF AUTHORITIES (Cont.)


Statutes and Constitution

| | Page |
|---|---|
| 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 92-576, 86 Stat. 1265 (October 27, 1972)..... | 2,3,4,7,8, 22,23,24,25,26,27,28,36,37,38,39,40,41,43, 45,48,49,A-7,A-8,A-9,A-29,A-30,A-31,A-32, A-34,A-39,A-43,A-51,A-52,A-56,A-70,A-73, A-80,A-83,A-90,A-91,A-92 |
| Occupiers' Liability Act, 1957.... | A-48 |
| United States Constitution, Art. III, § 2..... | A-50 |
| United States Constitution, Art. III, §2, cl. 1..... | 6,22 |
| 28 U.S.C. § 1257(3)..... | 6,22,A-85 |
| 28 U.S.C. § 2101(c)..... | 6,22,A-85, A-86 |
| 33 U.S.C. § 901 et seq..... | A-7 |
| 33 U.S.C. § 901(21)..... | A-9 |
| 33 U.S.C. § 905..... | A-40,A-71 |
| 33 U.S.C. § 905(b)..... | 3,7,8,23,25, 26,41,43,47,48,A-18,A-29,A-33,A-54,A-60, A-87,A-88 |
| Oregon Constitution, Amended Art. VII, § 3..... | A-19 |

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| | |
|---|---|
| Benedict on Admiralty, 7th ed. Jhirad..... | A-51,A-61 |
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INDEX OF AUTHORITIES (Cont.)


| | Page |
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| Deacon, The Injured Longshoreman vs. The Shipowner After 1972: Business Invitees Land-Based Standards, and Assumption of Risks, 28 Hastings L.J. 771 (1977) | A-34 |
| Ehrenzweig, Negligence Without Fault (1951) | A-35,A-61 |
| Fleming, The Law of Torts, 3d ed, p. 111 | A-35 |
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| Gilmore & Black, The Law of Admiralty, (2d ed The Foundation Press, Inc., Mineola, N.Y. 1975) 452 § 4-1 | A-91 |
| 2 Harper and James, The Law of Torts 1430 et seq. (1956) | A-49 |
| House Report No. 92-1441 | 28,36,37,43, A-36,A-37,A-39,A-45,A-49,A-52, A-54,A-70,A-71,A-72,A-76 |
| Odgers, [1957] Com. L.J. 39 | A-48 |
| Payne, 21 Mod. L. Rev. 359 | A-48 |
| Prosser, Law of Torts 351, 4th ed., Hornbook Series (1971) | A-48 |
| Prosser, Law of Torts (4th ed, West Publishing Co., 1971) 468 § 71 | 41 |
| Chapter 15, Restatement (Second) of Torts | A-52 |




INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| 2 Restatement 215-216, Torts Second § 343 | 29,31,35,37, 39,41,A-34,A-42,A-43,A-45,A-88,A-89 |
| 2 Restatement 218, Torts Second § 343A | 29,31,35,37, 39,42,A-34,A-42,A-43,A-45,A-46,A-89 |
| 2 Restatement 219-220, Torts Second § 343A, comment e | 35 |
| 2 Restatement 370-426, Torts Second §§ 409-429 | 36,39,40, A-53,A-54,A-55 |
| 2 Restatement (Second) of Torts § 409 | A-53 |
| Section 410 of Restatement (Second) of Torts | A-62,A-63, A-64 |
| Section 413, Restatement (Second) of Torts | A-56,A-58 |
| 2 Restatement (Second) of Torts § 414 | A-52,A-55 A-59 |
| 2 Restatement 396, Torts Second § 416, comment c | 41 |
| Robertson, "Negligence Actions by Longshoremen against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," pp. 449-50 Journal of Maritime Law and Commerce (April 1976) | A-51,A-56, A-83 |
| Salmond, Chap. 12 | A-48 |
| Senate Report of the Labor and Public Welfare Committee, No. 92-1125, September 14, 1972 | A-36,A-37 A-38,A-39,A-40,A-41,A-42,A-45,A-49,A-52 A-54,A-70,A-71,A-72,A-76 |
| Street, Chap. 10, Sect. 2 | A-48 |

INDEX OF AUTHORITIES (Cont.)


| | Page |
|---|---|
| Theis, Amended Section Five of the Longshoremen's and Harbor-workers' Compensation Act, 41 Tenn. L.R. 773 (1974)..... | A-34 |
| 3 U.S.C. Cong. & Ad. News 4698.... | 23,28,36, 37,43 |
| Vickery, E. D., "Some Impacts of the 1972 Amendments to the Long-shoremen's and Harbor Workers' Compensation Act," 41 Ins. C.J. 63 (Jan. 1974)..... | A-43,A-44 A-90,A-91 |


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---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

---

Weyerhaeuser Company, a Washington corporation, prays that a Writ of Certiorari issue out of this court to

review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case.

## OPINIONS BELOW

Plaintiff, Patricia Anne Shepler, in her individual capacity as surviving spouse and as personal representative of Oren D. Shepler, deceased (hereinafter referred to as "Mr. Shepler" or "plaintiff") commenced an action at law seeking damages for bodily injury and wrongful death of Mr. Shepler on December 21, 1972, from defendant, Weyerhaeuser Company (hereinafter referred to as "defendant Weyerhaeuser" or "charterer") and defendant, Pacific Coast Shipping Company, Liberia, (hereinafter referred to as "defendant Pacific Coast" or "shipowner"). Plaintiff's cause of action sounded in negligence and rests upon the 1972



Amendments to the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 905 (b); see STATUTORY PROVISIONS INVOLVED, (Pet. pp. 7-8, and Appendix D, p. A-87, infra). Mr. Shepler's death arose out of his occupation as a longshoreman employed by Portland Stevedoring Company (hereinafter referred to as the "stevedore") during the loading of logs aboard the M/S PACKING on navigable waters of the Columbia River in Longview, Washington. At the time of the accident, Pacific Coast had chartered the M/S PACKING to Weyerhaeuser under a Beizai Charter Party (Ex. 12), a voyage charter for twenty-four consecutive voyages, and Weyerhaeuser had contracted with the stevedore to perform the loading operation (Ex. 44). Mr. Shepler fell approximately twenty-six feet to his death into a gap between the cargo and the bulkhead while

climbing on the end of some loaded logs (Tr. pp. 257-258, 318).

The trial came on for hearing on December 15-18, 1975, before the Honorable Robert E. Jones, Circuit Judge, Multnomah County, State of Oregon, sitting with a jury. At the end of plaintiff's case-in-chief, the Circuit Court granted the ship-owner's motion for a directed verdict (Tr. p. 419). The trial court denied Weyer-haeuser's motions for a judgment of in-voluntary nonsuit (Tr. pp. 420-429) and for a directed verdict (Tr. pp. 546-547) which raised the questions concerning the duty and standard of care of the charterer under the 1972 Amendments. Judge Jones submitted the cause to the jury on two allegations of negligence directed to Weyerhaeuser:

> (1) "In failing to author-ize the use of a bull winch



> under the circumstances then and there existing", and
>
> (2) "In requiring the dead-ending of the log drafts" (Trial court file; Tr.p. 422).

In response to special interrogatories, which necessarily raised the equitable credit doctrine, the jury found the charterer Weyerhaeuser twenty-eight percent negligent, the stevedore seventy-two percent negligent, and assessed plaintiff's damages at $500,000.00 (App. A; trial court file). Weyerhaeuser appealed from the judgment entered upon this verdict. The decision of the state Circuit Court, consisting of a verdict on special interrogatories and judgment, not officially or unofficially reported, ap-pears verbatim in Appendix A (A-1 - A-5).

The Supreme Court of the State of Oregon affirmed the judgment of the Multnomah County Circuit Court on September

13, 1977, in an Opinion officially and unofficially reported at 279 Or. 477, 569 P.2d 1040 (1973). This Opinion is appended verbatim as Appendix B (A-6 - A-83).

JURISDICTION

The judgment sought to be reviewed is dated September 13, 1977, and mandate was stayed on November 15, 1977.

The constitutional and statutory provisions believed by petitioner to confer jurisdiction on this court to review the judgment in question are the Constitution of the United States, Art. III § 2, cl. 1; 28 U.S.C. § 1257(3); and 28 U.S.C. § 2101(c), which are reproduced in relevant part in Appendix C (A-84 - A-86).

QUESTIONS PRESENTED FOR REVIEW

1. What duty do shipowners or charterers owe to longshoremen employed by



expert independent stevedores under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)?

2. If a charterer may be held liable to a longshoreman injured during a loading operation, where the jury finds the charterer only twenty-eight percent at fault and assesses the stevedore-employer's responsibility at seventy-two percent, must the charterer respond for 100% of the plaintiff's damages under the exclusive remedy provision of the 1972 Amendments to the Longshoremen's and Harbor Worker's Act, or is it entitled to equitable credit for the stevedore's fault?

STATUTORY PROVISIONS INVOLVED

This petition concerns, as a matter of first impression, the interpretation of the shipowner's or charterer's duty to an injured longshoreman under Pub. L. 92-576, 86

Stat. 1265 (October 27, 1972), 33 U.S.C. § 905(b) (see Appendix D, A-87 - A-88, infra, for full text).

## STATEMENT OF THE CASE

### A. Statement of Facts.

#### 1. Weyerhaeuser employs an expert stevedore to load the vessel.

Weyerhaeuser ships logs to its purchasers throughout the world, both on owned and on chartered vessels (See, e.g. Tr. pp. 292, 434, 485 et seq).

Weyerhaeuser does not load any owned or chartered vessels (Tr. p. 92). Instead it contracts this responsibility to independent expert stevedores, in this case, Portland Stevedoring Company (Ex. 44; Tr. pp. 488-489) under a "Cost plus a commodity fixed fee" contract (Tr. p. 500, confirm p. 526). The stevedoring contract provides that the stevedore will furnish



all men and material necessary to the safe and efficient execution of the loading or discharge of cargo (Ex. 44). Weyerhaeuser expects the stevedore to comply fully with the minimum safety regulations contained in the Pacific Coast Marine Safety Code during its work on chartered vessels (Tr. pp. 192-193, 496).

The stevedore furnishes all gear necessary to work the ship (Tr. pp. 531, 533). The Stevedore determines how to load the vessel and the charterer merely specifies what cargo should be loaded and where it is to be loaded (Tr. pp. 504-505, 535); the stevedore walking boss and hatch boss decide how to load the cargo in the hatch (Tr. p. 344). Weyerhaeuser did not tell the stevedore gang boss how to load the logs in the hatch - that constitutes the longshoreman's choice (Tr. pp. 288, 480, 486).

Weyerhaeuser pays a union supercargo, Mr. Pitzer in this case, to oversee its interests during loading (Tr. pp. 187, 485-486). He acts primarily as a clerk (Tr. pp. 136, 467, 475) and orders the logs from the log yard to the ship (Tr. p. 291); the "lineup" of logs consists of the particular lengths, widths and diameters ordered by the Japanese buyer (Tr. pp. 292, 485-486). Mr. Wilson, the Weyerhaeuser loading superintendent, takes the purchase orders and assigns the cargo to a specific ship (Tr. p. 434) with the assistance of the supercargo (Tr. pp. 485-486). In simple terms, Weyerhaeuser ships what the purchaser orders (Tr. pp. 292, 485-486). The supercargo is not a safety engineer (Tr. p. 447).

Code and custom place the primary burden for waterfront safety upon the stevedore and its employees (Tr. pp. 153, 344, 469) and



require the supervisory stevedore personnel to ascertain that all working conditions are safe and that the men carry out the operation in a safe manner (Ex. 18; Tr. p. 153). Mr. Tucker Mayeda, the stevedore superintendent (Tr. p. 109) and superior on the M/S PACKING job (Tr. p. 154), admitted that he owed a duty to halt work if any of his men were placed in danger (Tr. pp. 154-155); he did not stop work in this instance (Tr. p. 155). No one complained about any unsafe working conditions in the number one hatch of the M/S PACKING (Tr. p. 175).

As the stow increased in height, a crevice developed between the end of the logs and aft bulkhead (Tr. pp. 154, 173) because, as the load built up, the bridle which held the descending logs tended to strike the coaming and inhibited the drift of the logs toward the after bulkhead (Tr. p. 188). Nothing prevented the stevedore

from rolling logs back into the open area and filling the void (Tr. p. 494). Stevedore superintendent Mr. Mayeda described the condition as obvious and apparent to all concerned (Tr. p. 171); supercargo Mr. Pitzer concurred (Tr. p. 201). Mr. Walter Lawrence Rappana, Jr., testified that he did not consider the condition unsafe or unusual (Tr. pp. 324-325). Mr. Mayeda knew of the condition and did not halt the practice (Tr. pp. 154-155). Gang boss, Mr. Scott, did not know beforehand that Mr. Shepler and Mr. Rappana were going to crawl down the stow (Tr. p. 274). Stevedore hatch tender, Mr. Witham, viewed the stow just prior to the accident and noticed nothing unusual about it (Tr. pp. 302-303).

2. The Longshoremen chose to "dead-end" the logs.



The workmen in the hold, including Mr. Shepler, decided to employ a loading method known as "dead-ending" in order to achieve a tighter stow by rolling the logs into the wings (Tr. pp. 237-238, 252, 267, 327). "Dead-ending" involves attaching a wire rope to a log in place with a "bear claw" (Ex. 31; Tr. p. 237) (The "dead-end"), extending the wire rope under another log to be moved, and rolling the second log into place against the first by manipulating the wire rope with a crane (See, e.g., Tr. pp. 161, 189, 237-238, 296-297, 313-314, 443-444). No one instructed the longshoremen to use this method; Mr. Rappana, the longshoreman teaming with Mr. Shepler at the time of his death (Tr. p. 308), testified that he and Mr. Shepler decided to employ this method (Tr. p. 327). Mr. Scott, gang boss on the number one hatch (Tr. p. 226), testified to the same effect (Tr. p. 267).

Mr. Mayeda and other stevedore supervisors specifically testified that neither the Weyerhaeuser representative, Mr. Wilson, nor the Weyerhaeuser super-cargo, Mr. Pitzer, requested, required or advised any stevedore employee to "dead end" the log drafts (Tr. pp. 158-159) or to perform any unsafe loading practice (Tr. pp. 200, 348). Longshoremen take orders from their employer and superior, not from the shipper (charterer) representatives (Tr. pp. 195, 197, 228, 263, 288). Stevedore walking boss, Mr. Monroe, conceded that no Weyerhaeuser employees told him to proceed with unsafe loading practices or to place his men in jeopardy (Tr. p. 348). Mr. Wilson of Weyerhaeuser declared that he requested Mr. Mayeda to secure a tight stow, but that he did not tell him the means and methods to employ in achieving this end (Tr. p. 435). Stevedore walking



boss, Mr. Monroe, (Tr. p. 331) did not know that his employees were "dead-ending" the logs in the hatch (Tr. p. 352). Mr. Wilson did not direct the longshoremen to practice "dead-ending" (Tr. p. 444).

Alternative methods to "dead-ending" exist by which the longshoremen can move log drafts into the wings (Tr. pp. 445, 473).

3. The Accident.

Mr. Rappana and Mr. Shepler "dead-ended" the first load of logs after lunch (Tr. pp. 311-313, 327); in the process, the "bear claw" became entwined in the stow which the men rolled (Tr. p. 313). No one directed Mr. Shepler or his partner to release the "bear claw"; often, this gear is left aboard for removal and return upon discharge (Tr. pp. 241-242, 263-264). Mr. Shepler, a class "A" registered long-

shoreman (Tr. p. 225), descended over the end of the logs and tried to remove the device (Tr. pp. 299, 316). His endeavor failing, Mr. Shepler started to climb back to the top of the stow (Tr. pp. 316, 318). Mr. Shepler wore special safety "sandals", spiked shoes for better footing (Tr. p. 284). Mr. Rappana turned away and concentrated his attention elsewhere, so he did not observe the accident; he heard Mr. Shepler plummet to the surface below (Tr. pp. 317-318). Consequently, plaintiff could adduce no evidence of the actual cause of Mr. Shepler's fall (see Tr. p. 318). No one knows if he slipped, jumped, fainted or fell for some other reason. No prior accidents occurred at this hatch (Tr. p. 505). No Weyerhaeuser employees were present at the scene of the accident (Tr. pp. 196, 438).



Mr. Witham, the hatch tender and safety man from the stevedore gang (Tr. pp. 295, 305), observed Mr. Shepler's movements and had no concern for his safety (Tr. pp. 305, 307). Gang boss, Mr. Scott, (Tr. p. 227) described Mr. Shepler as a good, safe longshoreman, not a man prone to take risks (Tr. pp. 254, 268).

4. No one told Weyerhaeuser that "bull winches" would improve safety.

Plaintiff contended that a stowing machine termed a "bull winch" should have been utilized to eliminate any hole (Tr. p. 239). The shipowner has not supplied bull winches on any of its chartered vessels for at least ten years and the ship's general agent could not recall seeing them used (Tr. pp. 95-96). The other witnesses unanimously agreed that no one has employed these devices for a

number of years and the method is considered obsolete (Tr. pp. 95-96, 138-139, 211, 264-265, 289, 342, 437, 492). The stevedore had two bull winches available in its gear (Tr. pp. 116, 162, 342). Mr. Mayeda, the stevedore superintendent (Tr. pp. 109, 154), could have ordered a bull winch if he believed the mode of stowage constituted a safety hazard (Tr. pp. 140-141). The stevedore has loaded the M/S PACKING on two subsequent occasions in Longview and no longshoremen ever requested the use of a bull winch (Tr. p. 475), nor did any party introduce evidence of use of bull winches on any other voyage.

Captain McKimmey of Weyerhaeuser would not have authorized the use of a bull winch, a dangerous device, if asked, but the stevedore could have countermanded his decision if it determined such use would be appropriate (Tr. p. 504).



Plaintiff adduced evidence that Mr. Mayeda and other stevedore employees advised Weyerhaeuser personnel that the use of bull winches would produce a very tight stow and Weyerhaeuser declined to authorize their employment (Tr. pp. 112, 116-117, 336-337, 525-526). At no time in the discussions did anyone from the stevedore intimate that failure to use bull winches would or could create a safety hazard for the longshoremen in the hold. The discussions always centered on the tightness of the stow, not any safety factor (Tr. pp. 140, 160, 198, 341, 440, 527, 529). No one indicated that the stevedore planned to employ unsafe loading practices (Tr. p. 141). Mr Lyle Devenney, stevedore vice-president (Tr. p. 523), made this point clear:

> "Q . . . You didn't tell Captain McKimmey or whoever you talked to at Weyerhaeuser that your

company could not stow the ship safely without bull winches, did you?

"A It's just that at no time was safety brought up. It was just what was my ideas for a tighter stow.

"Q You were satisfied in your own mind that your company could load the ship in a safe manner without the use of bull winches; isn't that correct?

"A As I say again, that I'm bound by contract. The contract with Weyerhaeuser, part and parcel of that contract is that we carry on the work in a safe, workmanship manner. Again I repeat that at no time was safety ever brought up.

"Q The only way the bull winches came up was tightness of the stow?

"A Yes." (Tr. p. 527) [Emphasis supplied.]

In addition to the various stevedore supervisory personnel and other longshoremen, Mr. Shepler's gang included four holdmen (Tr. pp. 199, 243). Two of these four men work in the morning and the other two (Mr. Shepler and Mr. Rappana) work in



the afternoon, although all four receive a full day's pay (Tr. pp. 243, 260 et seq, 308-309, 326-327). If a longshoreman deems it necessary to climb over the end of some logs, his employer possesses the necessary gear and manpower to construct a safety line, safety belt, harness or other precautionary device (Tr. pp. 156, 281, 327-328, 351-355). Safety lines and related items constitute standard equipment in the stevedore's gearbox (Tr. pp. 156, 198-199, 350). The longshoremen do not expect Weyerhaeuser employees to enter their territory and rig a safety net (Tr. pp. 286-287). Gang boss, Mr. Scott, testified that had he encountered any concern for the safety of his men, he would have instructed the extra two holdmen to devise a sling, safety line, or protective harness; had he taken this

simple step, Mr. Shepler would not have fallen (Tr. p. 281).

B. Basis For Federal Jurisdiction.

Jurisdiction of this court rests upon the Constitution of the United States, Art. III, § 2, cl. 1; 28 U.S.C. § 1257(3); and 28 U.S.C. § 2101(c). These provisions are reproduced in Appendix C (A-84 - A-86).

## Reasons for Allowing Writ

## SUMMARY OF ARGUMENT

The Supreme Court of the State of Oregon has decided a recurring federal question of seminal importance--the shipowner's duty or standard of care owed to an injured longshoreman under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act--and has decided it in a manner in conflict both with the decisions of most federal courts and with the legislative history of the statute. In essence, the Oregon Court has



created a duty akin to seaworthiness in contradiction to the 1972 Amendments. This court has not previously considered questions concerning interpretation of the 1972 Amendments or the extent of the shipowner's liability. The draftsmen of 33 U.S.C. § 905(b) intended uniform application of the maritime negligence remedy, 1972 U.S.C. Cong. & Ad. News 4698, 4703-4704; inconsistent decisions, such as that rendered in the present case, as well as those inconsistent decisions emanating from the several federal courts, destroy uniformity while imposing an incorrect burden upon the charterer or shipowner.

The Supreme Court of the State of Oregon refused to grant equitable credit to a charterer found only twenty-eight percent at fault where the jury held the longshoreman's stevedore-employer seventy-two percent at fault. This decision

conflicts with the rule in Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186 (4th Cir. 1977) (rehearing en banc granted June 3, 1977, argued October 6, 1977), which limits the longshoreman's recovery under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act to the portion of the award measured by the shipowner's fault together with any valid lien the stevedore may possess on the recovery, not to exceed the whole of the possible award against the shipowner. In addition, a conflict in circuits exists between the Fourth (Edmonds v. Compagnie Generale Transatlantique, supra) and the Ninth Circuits. See Dodge v. Mitsui Shintaku Ginko K.K. Toyko, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed.2d 188 (1976); Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), cert.



denied, 425 U.S. 936, 96 S. Ct. 1668, 48 L. Ed.2d 177 (1976).

Moreover, the refusal to grant equitable credit strains the statutory language of 33 U.S.C. § 905(b) which imposes liability upon a shipowner for injuries "... caused by the negligence of a vessel, ... ."

This court has not reviewed any decision concerning the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, yet the volume of federal litigation indicates that important questions regarding the duty and liability of shipowners will grow rapidly unless and until the court speaks and interprets 33 U.S.C. § 905(b). The present case offers an appropriate vehicle for decision because a state court judge--whose incorrect opinion may influence other jurists--wrongly decided a vital question of federal law central to the meaning of the statute.

## ARGUMENT

### I. SHIPOWNER'S STANDARD OF CARE

### A. The 1972 Amendments: Legislative History and Meaning.

The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act [hereinafter referred to as the "1972 Amendments" or "33 U.S.C. § 905(b)"] removed the strict liability remedy (the shipowner's absolute warranty of seaworthiness) and substituted a uniform federal negligence liability as the longshoreman's exclusive remedy against the shipowner. 33 U.S.C. § 905(b); Birrer v. Flota Mercante Gran Colombiania, 386 F. Supp. 1105 (D. Or. 1974). In return, the act provided a dramatic increase in available compensation benefits. Lucas v. "BRINKNES" Schiffahrts Ges., 379 F. Supp. 759 (E.D. Pa. 1974), appeal dismissed, 387 F. Supp. 440 (3rd Cir. 1975), cert.



denied, 423 U.S. 866, 96 S. Ct. 127, 46 L. Ed.2d 95 (1975). Yet, even under the pre-1972 Amendments law, the shipowner bore no liability for injury to a longshoreman sustained during the loading process where the stevedore-employer retained operational control of the loading and the vessel or shipper (charterer) merely designated and checked the cargo. Stranahan v. A/S Atlantica & Tinfos Papirfabrik, 471 F.2d 369 (9th Cir. 1973), cert. denied, 412 U.S. 906, 93 S. Ct. 2293, 36 L. Ed.2d 971 (1973); see also, West v. United States, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed.2d 161 (1959). Nevertheless, in the present case, the Oregon courts absolved the shipowner (who retains ultimate control) as a matter of law, but imposed liability upon a voyage (Beizai) charterer or shipper of goods.

Congress did not enact a special, attenuated maritime theory of negligence, comparable to the Jones Act standard of care, by passage of the 1972 Amendments. It intended to grant the maritime employee the same rights and obligations as a landed workman. House Report No. 92-1441, 3 U.S.C. Cong. & Ad. News 4698, 4703-4704, state this objective:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be in if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like." (p. 4703)
>
> "... the vessel shall not be liable as a third party unless it is proven to have acted or failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." (p. 4704)



Most federal courts[1] have referred to the Restatement, particularly 2 Restatement 215-216, Torts Second § 343 (hereinafter referred to as "Restatement § 343") and 2 Restatement 218, Torts Second § 343A (hereinafter referred to as "Restatement § 343A") for a definitive statement of the law of the land. See, e.g., Gay v. Ocean Transport & Trading Co., 546 F.2d 1233, 1238 (5th Cir. 1977), rehearing denied, 549 F.2d 203 (5th Cir. 1977). The Oregon Supreme Court rejected (A-42, A-45, A-46) those sections which appear in Appendix E, infra (A-88 - A-89).

B. The Charterer Is Not Liable For Injuries Caused By Open and Obvious Conditions.

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[1]Federal law governs actions between longshoremen and shipowner. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-410, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

The Oregon Supreme Court ignored the rule which rejects liability for injuries caused by open and obvious conditions, despite the fact that most federal courts in similar situations have granted summary judgment for the shipowner. See, e.g., Lloyd Wescott v. Empresas Armadoras, S.A. Panama, et al, ____ F.2d ____ (9th Cir. No. 76-1611, decided November 14, 1977). Miles v. Shell Oil Company, 498 F.2d 105 (5th Cir. 1974); Fedison v. Vessel WISLICA, 382 F. Supp. 4 (E.D. La. 1974); Sloan v. Deniz Nakliyatin, 1975 A.M.C. 236 (Fla. Cir. Ct. 1974); Anuszewski v. Dynamic Mariners Corp. Panama, 391 F. Supp. 1143 (D. Md. 1975, aff'd, 540 F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098, 97 S. Ct. 1116, 51 L. Ed.2d 545 (1977); Hite v. Maritime Overseas Corp., 380 F. Supp. 222, 226 (E.D. Tex. 1974) [see also, 375 F. Supp. 233 (E.D. Tex.



1974)]; Cummings v. "SIDARMA" Soc., 409 F. Supp. 869 (E.D. La. 1976); Hess v. Upper Mississippi Towing Corp., 559 F.2d 1030 (5th Cir. 1977); Bossard v. Exxon Corp., 559 F.2d 1040 (5th Cir. 1977). The undisputed evidence in this case characterized the crevasse between the loaded logs and the bulkhead as "open and obvious" (Tr. pp. 171, 201).

Napoli v. [Transpacific Carriers, Etc.] Hellenic Lines, 536 F.2d 505 (2d Cir. 1976) seems to take a different approach and to reject Restatement §§ 343, 343A and the "open and obvious condition" rule. However, the language of the Second Circuit is dicta, 536 F.2d at 508, and the shipowner there acted as its own stevedore, thus distinguishing the case from that at bar. See, also, Valle v. Jugoslavenska Linejska Plovidba, 434 F. Supp. 608 (S.D. N.Y. 1977)

C. The Charterer Does Not Owe Any Duty To Provide a Safe Place to Work.

The Oregon court also ignored the rule, developed by the federal courts in several decisions involving similar operative facts, that the stevedore, not the shipowner (or charterer), owes the longshoreman the duty of providing a safe place to work. Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977); Gay v. Ocean Transport & Trading Co., supra; Hite v. Maritime Overseas Corporation, supra; Parker v. Costa Amatori S.P.A., _____ F. Supp. _____ (No. 74-454-N, E.D. Va. 1975). Thad Higgins v. Flota Mercante Grancolombia, S.A., _____ F Supp._____ [74 Cir. 5510 (C.M.M.)] (S.D. N.Y., April 15, 1976); Lucas v. "BRINKNES", Schiffahrts Ges., supra; Fedison v. Vessel WISLICA, supra; Slaughter v. RONDE, 390 F. Supp. 637 (S.D. Ga. (1974); aff'd



509 F.2d 973 (5th Cir. 1975); Johnson v. Zenith Navigation, _____ F. Supp._____ (No. 74-1502) (E.D. La. 1975); Fitzgerald v. Compania Naviera La Molinera, 394 F. Supp. 413 (E.D. La. 1975); Robinson v. Dixie Machine W & M Works, et al, 1975 A.M.C. 2114 (E.D. La. 1975.)[2] Butler v. O/Y Finnlines, Ltd., 537 F.2d 1205 (4th Cir. 1976) (appeal pending), seemingly conflicts with the foregoing authority. However, in Butler v. O/Y Finnlines, Ltd., supra, the third mate actually supervised and directed the loading, unlike Weyerhaeuser's nonparticipation here.

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[2]In addition, the following decisions rule for the shipowner as a matter of law: Vega v. Pan Am. Fruit Co., 1975 A.M.C. 187 (S.D. N.Y. 1974); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 109 (D. Md. 1975); Bess v. Agromar Line, 518 F.2d 738 (4th Cir. 1975); Citizen v. M/V TRITON, 384 F. Supp. 198 (E.D. Tex. 1974) (tried on stipulations and briefs); Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974).

The shipowner chooses an expert to load and unload its vessel; it ought not be held for damages because that expert decides to proceed in an unsafe manner. Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837 (2d Cir. 1977). Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977). Here, Weyerhaeuser is merely a charterer, a shipper of goods, and does not even own any stevedoring equipment (Tr. pp. 92, 442).

The shipowner need not alleviate an allegedly dangerous condition, even if it possesses adequate notice, if the condition results from the stevedore's work and the stevedore occupies the better position to abate the danger. Brown v. Mitsubishi, supra; Bovia v. S/S Agia Erini, 433 F. Supp. 1020 (E.D. La. 1977). On November 14, 1977, the Ninth Circuit decided Lloyd Wescott v. Empresas Armadoras, S.A. Panama,



et al, supra, a case similar to the present one. In the federal decision, the court reached a result contrary to the Oregon Supreme court where the stevedore chose the method of loading and the shipowner merely requested the result. Until this court rules on the issues, such disparate decisions will continue to mark the admiralty jurisprudence.

D. The Oregon Supreme Court Improperly Rejected Restatement §§ 343, 343A Because These Sections Allegedly Embody "Assumption of the Risk" Factors and Unfairly Favor the Landowner.

The Oregon Supreme Court rejected Restatement §§ 343, 343A as the definitive statement of the land law of liability in a maritime setting because Restatement § 343A, Comment e includes the doctrine of assumption of risk (2 Restatement 219-220, Torts Second § 343A, comment e) which the

Congressional Report regarding the 1972 Amendments specifically rejected (House Report No. 92-1441, 3 U.S.C. Cong. & Ad. News 4698, 4705) (A-42). In this regard, the Oregon court relied upon Brown v. Ivarans Rederi A/S, 545 F.2d 854, 863, n. 10 (3rd Cir. 1976), rehearing denied (November 29, 1976), and seemed to favor the analysis of Hurst v. Triad, 554 F.2d 1237 (3rd Cir. 1977), appeal pending, which utilized 2 Restatement 370-426, Torts Second §§ 409-429 (hereinafter referred to by "Restatement" and section number).

(1) Assumption of Risk - The Forbidden Phrase.

If a single comment to a pair of Restatement sections justifies throwing the baby out with the bathwater, and overturning several well-considered federal cases to boot, this action should take place by direction of the highest



court of the United States, rather than a state Supreme Court. The issue is one of recurring federal importance and the decision impedes the uniformity sought by the legislative draftsmen. While these draftsmen intended to eliminate assumption of risk, they also intended to incorporate the law of landowner liability which is stated in the text of Restatement §§ 343, 343A. The state court reason for its decision provides too much. If the 1972 Amendments are designed to place longshoremen in parity with landed workmen, House Report No. 92-1441, 3 U.S.C. Cong. & Ad. News 4698, 4703-4704, and if landed workmen cannot recover for injuries received from an encounter with open and obvious conditions even under a theory of strict liability, Askew v. Howard-Cooper Corp., 263 Or. 184, 502 P.2d 210 (1972), then the doctrine of Restatement §§ 343, 343A

applies to cases arising under the 1972 Amendments even if the "open and obvious" rule imparts some of the same philosophy as the tenet of assumption of risk.

Some courts, including Oregon's Supreme Court, have analyzed assumption of risk in strict liability cases as consisting of three elements (1) subjective knowledge and appreciation of the risk, and (2) a voluntary and (3) unreasonable encounter with that risk. Johnson v. Clark Equipment Co., 274 Or. 403, 409, 547 P.2d 132 (1976). In the present case, the longshoreman did not have to climb down the logs, nor did he have to dead-end the cargo. He made these choices voluntarily, without suggestion or direction from the charterer (Statement of Facts, Petition pp. 12-15, supra). The three elements set forth apply to negligent conduct as well as to some proposition of assumption of



risk, and negligence is what the 1972 Amendments considers. Therefore, the reason stated for avoiding Restatement §§ 343, 343A does not apply in the present case because the rule deals with negligent conduct similar to that governing land-based workmen.

(2) Are Landowners a Favored Class?

The Oregon Supreme Court argued that landowners receive favored treatment by the law and that the draftsmen of the 1972 Amendments could not have intended to import such rules into maritime law. Neither proposition is true and the second does not follow the first. State courts should not decide cases based on non sequiturs when those decisions affect important federal questions.

(3) Restatement §§ 409-429, Which Envision Indemnity From the Causative Agent, Do Not Apply

Under the 1972 Amendments Which Prevent the Shipowner or Charterer From Securing Indemnity From The Negligent Stevedore.

At least two recent decisions have determined that Restatement §§ 413, 416 do not render the shipowner liable to the injured longshoreman under the 1972 Amendments: Kelleher v. Empresa Hondurena de Vapores, S.A., 57 Cal. App.3d 52, 129 Cal. Rptr. 32 (1976); Teofilovich v. D'Amico Medit./Pacific Line, 1976 A.M.C. 1621, ____ F. Supp.____ (C.D. Cal. 1976). In each instance, the Court recognized that legislative history militated against an expansion of liability by the employment of "non delegable" vicarious liability. Moreover, the policy behind Restatement §§ 413, 416 rests upon the theory that the landowner [shipowner or charterer] can secure indemnity from the responsible in-



dependent contractor [stevedore]. 2 Restatement 396, Torts Second § 416, comment c. See also, Prosser, Law of Torts (4th ed, West Publishing Co., 1971) 468 § 71. 33 U.S.C. § 905(b) prohibits the shipowner or charterer from recovering indemnity from the stevedore, thereby eliminating the fairness and equality necessary for application of these Restatement sections.

E. The Oregon Supreme Court Standard Not Only Does Not Govern Maritime Negligence Cases Arising Under the 1972 Amendments But Also Ignores the Undisputed Facts of This Case.

The Oregon Supreme Court sets up straw man after straw man, constantly criticizing Congressional language (A-35, A-36, A-37, A-38) but never really coming to grips with the problem it poses, the shipowner's standard of care under the 1972 Amendments. It rejects Restatement §§ 343,

343A (A-45 - A-46), Restatement §§ 409-429 (A-58), and the meaningless verbiage of Heaven v. Pender, 11 Q.B.D. 503, 509 (1883) (A-61). It then reverts to Restatement § 410 [which should not apply because of lack of indemnity, see Argument I, D(3) supra] and apparently holds that:

> "Under any duty thus far suggested by federal decisions, if the employer of an independent contractor dictates a particular method for performing the contracted work which is unreasonably dangerous to the workmen of the independent contractor, taking into consideration the possible alternative methods, he is responsible in damages for injuries caused to such workmen thereby. ... ." (A-62)[3]

The Oregon court has created a "duty" which is akin to the absolute warranty of seaworthiness, despite the fact that the Congress removed this strict duty by enact-

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[3]A sounder analysis appears to be that of Judge Orrick in Gallardo v. Westfal-Larsen, 1977 A.M.C. 1325 (N.D. Cal. 1977).



ment of the 1972 Amendments, 33 U.S.C. § 905(b); House Report No. 92-1441, 3 U.S.C. Cong. & Ad. News 4698, 4703-4704. This decision conflicts with Munoz v. Flota Merchante Grancolombiana S.A., supra, and Ruffino v. Scindia Steam Navigation Co., supra, among others. As the Fifth Circuit held this year in Hess v. Upper Mississippi Towing Corp., supra, 559 F.2d 1030 (5th Cir. 1977), the shipowner is not liable to the employee of an independent contractor when the work under contract involves the danger which leads to the loss. Under these principles, the Oregon Supreme Court adopted an errant test!

Moreover, the test adopted, if proper, absolves Weyerhaeuser. It did not dictate, direct, or supervise the loading (Tr. pp. 158-159, 200, 288, 348, 480, 486). It hired an expert stevedore and turned the job over to it (Ex. 44; Tr. pp.

488-489). It relied upon the expertise and safety-consciousness of the longshoremen and their employer to handle the job (Tr. pp. 192-193, 496). It rejected bull winches but no one advised the shipper that these obsolete machines would allegedly increase safety (Tr. pp. 140, 160, 198, 341, 440, 527, 529). The men in the hold decided to "dead-end" the logs (Tr. pp. 237-238, 252, 267, 327). No Weyerhaeuser employee even graced the scene (Tr. pp. 196, 438). Foreseeability forms an essential element of negligence. Newman v. Utility Trailer, 278 Or. 395, 397-400, 564 P.2d 674 (1977). As Mr. Rappana, Mr. Shepler's partner, testified without contradiction:

> "I don't think anybody could foresee what happened." (Tr. p. 330).

On this basis, if no other, the Supreme Court of Oregon erred in imposing liability



upon Weyerhaeuser under any test. The unfortunate effect of the matter, however, and the reason this court should review the case and speak authoritatively upon the issue, is the garbling of the standard of care of the shipowner under the 1972 Amendments.

## II. EQUITABLE CREDIT

The jury found that plaintiff had suffered $500,000.00 damages as the result of the concurrent negligence of the stevedore (seventy-two percent) and the charterer (twenty-eight percent). (A-1 - A-2). Assuming arguendo the propriety of the Circuit Court submission of the cause against Weyerhaeuser to the jury (Argument I, supra), in no event should judgment be entered against the charterer for more than its proportionate share of the loss: $140,000.00 or twenty-eight percent of $500,000.00.

The Fourth Circuit applied this "equitable credit" doctrine in favor of the shipowner in Edmonds v. Compagnie Generale Transatlantique, supra, 558 F.2d 186 (4th Cir.1977) (Rehearing en banc granted June 3, 1977, argued October 6, 1977). The Ninth Circuit rejected the doctrine in Shellman v. United States Lines, supra, 528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936, 96 S. Ct. 1668, 48 L. Ed.2d 177 (1976); see also Dodge v. Mitsui Shintaku Ginko K.K. Toyko, supra, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed.2d 188 (1976). The Supreme Court of Oregon refused to grant equitable credit here, although it conceded "Application of the doctrine does have some appeal, ... ." (A-76). This conflict in the circuits and conflict between a state court and a federal appellate court



justify this court in granting this petition for certiorari.

Textwriters, courts, and advocates have condemned the ridiculous result which would require a one percent negligent shipowner to pay 100% of the longshoreman's damages without hope of indemnity or contribution from the plaintiff's ninety-nine percent negligent employer.[4] 33 U.S.C. § 905(b). Admiralty employs equitable principles. This court should not foster an inequity of such proportion, for to do so may cripple the shipping industry, encourage negligence by stevedoring companies and induce biased and false testimony from stevedoring employees.

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[4]Citations to texts, treatises, and cases supporting the concept of an equitable credit appear in Appendix F, infra (A-90 - A-92).

In any event, it appears incredible to believe that Congress would have passed the 1972 Amendments in an attempt to alleviate some inequities which had developed in the system and intentionally create a greater one.

The equitable credit doctrine does not reduce the workmen's net recovery by one penny in most instances. Absent equitable credit, the injured longshoreman is the only one of three parties always required to bear the financial burden of his own proportional contributory fault.

Furthermore, linguistic analysis of 33 U.S.C. § 905(b) demonstrates the semantic stresses and strains placed upon the statutory language by interpreting "caused by the negligence of the vessel" to mean something other than (to the extent) "caused by the negligence of the vessel." If a loss is caused by the negligence of



the stevedore, it is not caused by the negligence of the vessel.

## CONCLUSION

Because this petition raises two undecided federal questions of importance--the shipowner's duty under the 1972 Amendments, and the appropriateness of the equitable credit doctrine--this court should grant this petition and hear the case on the merits.

Respectfully submitted,

SOUTHER, SPAULDING,
KINSEY, WILLIAMSON
& SCHWABE
KENNETH E. ROBERTS
PAUL N. DAIGLE
RIDGWAY K. FOLEY, JR.

By _____
RIDGWAY K. FOLEY, JR.
Attorneys for Petitioner Weyerhaeuser

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

| | | |
|---|---|---|
| PATRICIA ANNE SHEPLER, individually and as personal representatve of the Estate of Oren Lee Shepler, deceased, | ) | No. 410 645 |
| Plaintiff, | ) | SPECIAL INTERROGATORIES |
| vs. | ) | |
| WEYERHAEUSER COMPANY, a Washington corporation, | ) | |
| Defendant. | ) | |

INTERROGATORY NO. 1: Was the charterer negligent? Yes (Yes or No)

INTERROGATORY NO. 2: If so, by what percent was charterer's negligence responsible for plaintiff's decedent, Oren Lee Shepler's death? 28% (percent)

INTERROGATORY NO. 3: Was plaintiff's decedent, Oren Lee Shepler, negligent? No. (Yes or No)

INTERROGATORY NO. 4: If so, by what percent was Oren Lee Shepler's negligence responsible for his death? 0% (percent)

INTERROGATORY NO. 5: Was the stevedore company negligent? Yes (Yes or No)

INTERROGATORY NO. 6: If so, by what percent was the stevedore company's negligence responsible for Oren Shepler's death? 72% (percent)

INTERROGATORY NO. 7: What is the total amount of plaintiff's damages expressed in terms of dollars? $500,000.00

/s/ Thomas F. Coulter
JURY FOREMAN



IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

| | |
|---|---|
| PATRICIA ANNE SHEPLER, individually, and as personal representatve of the Estate of Oren Lee Shepler, Deceased, Plaintiff, vs. WEYERHAEUSER COMPANY, a Washington corporation, and PACIFIC COAST SHIPPING COMPANY, LIBERIA, Defendants. | No. 410 645<br>JUDGMENT ORDER |

The above-entitled cause having come on regularly for trial by jury before the Honorable Robert E. Jones, Judge of the above-entitled Court, plaintiff appearing in person and by Frank Pozzi, of her attorneys, and the defendant Weyerhaeuser Company appearing by Paul N. Daigle, of its attorneys, and the defendant Pacific Coast Shipping Company, Liberia, appearing by John R. Brooke, of its attorneys, and

the jury having been duly selected, empaneled and sworn, opening statements having been made by counsel, evidence having been received on behalf of the respective parties, arguments having been submitted to the jury by counsel, and the Court having entered a directed verdict in favor of the defendant Pacific Coast Shipping Company, Liberia, and the Court then having instructed the jury upon the law, and the jury thereupon having retired for deliberations, did return its verdict in favor of the plaintiff and against the defendant Weyerhaeuser Company and said verdict having been received and entered and accepted by the Court and the Court being fully advised in the premises now, therefore, based upon said verdict,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, Patricia Anne Shepler,



have of and recover from the said defendant Weyerhaeuser Company, the sum of Five Hundred Thousand Dollars ($500,000) in lawful money of the United States of America, together with her costs and disbursements incurred herein taxes [sic] and allowed in the sum of $154.00, the aggregate of which is to bear interest at the rate of six per cent [sic] (6%) per annum from the date of entry hereof until paid, and that execution issue therefor.

DATED this 19th day of December, 1975.

/s/ Robert E. Jones
Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

PATRICIA ANNE SHEPLER,
individually and as personal
representative of the Estate
of Oren Lee Shepler, Deceased,

Plaintiff-Respondent,

vs.

WEYERHAEUSER COMPANY, a
Washington corporation,

Defendant-Appellant,

and

PACIFIC COAST SHIPPING
COMPANY, LIBERIA,

Defendant-Respondent.

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No. 410-645
SC 24345

LENT, J.

This is an action for damages for death by wrongful act of another brought by the personal representative of Oren Shepler. Shepler, a longshoreman in the



employ of Portland Stevedore Company (Portland), was injured in a fall on December 21, 1972, during the loading of logs in the vessel M/S PACKING. He died from his injuries two days later. The action asserts a right to recover for damages resulting from negligence and involves the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 USC § 901 et seq. The action is against Pacific Coast Shipping Co., the owner of the PACKING, and Weyerhaeuser Co., as charterer of the vessel. The case was tried in December 1975. At the conclusion of plaintiff's case in chief, the trial court granted a directed verdict in favor of Pacific Coast. The jury found Weyerhaeuser at fault. (In using the word "defendant," we refer to Weyerhaeuser.)

Defendant appeals from the judgment entered upon this verdict. We affirm.

Defendant contends that the trial court erred in interpreting the standard of care owed by a vessel to a longshoreman under LHWCA and that a nonsuit or directed verdict should have been entered in its favor. It further complains of the failure of the trial court to instruct the jury on particular matters and attacks various instructions which were given. Additionally, defendant submits that under the LHWCA, where a jury finds the vessel to be only partially at fault it is inequitable to require the vessel to pay the entire damages assessed by the jury. Finally, defendant charges that it was error to exclude evidence that employes of Portland who were witnesses in the trial were biased because Portland had a financial stake in the outcome of the



litigation. (Under LHWCA, the stevedore-employer has a lien against third-party recoveries for compensation benefits paid under the Act.) To place these claims of error in perspective, we turn first to the undisputed facts.

The primary issue is to determine whether the evidence is sufficient under the 1972 amendments to support a finding of negligence on the part of defendant. This requires us preliminarily to ascertain the nature of the duty owed under the amendments by the vessel[1] to a longshoreman employed by a master stevedore.

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[1]The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member. 33 USC § 901(21).

UNDISPUTED FACTS

Defendant ships logs and lumber to its purchasers throughout the world. In 1972, after a trial voyage, defendant chartered the PACKING. Pacific Coast Shipping, the owner, and Weyerhaeuser executed a "Beizai Charter Party," a modified form of voyage charter, for 24 consecutive voyages, which contained the following provisions:

> "* * * Charterers to load, stow and discharge the cargo free of risks and expenses to owners. Charterers to have the liberty of working all available hatches. The vessel to provide motive power, winches, gins and falls at all times and, if required, to supply light for night work on board free of expenses to charterers."

The owners retained control over cargo stowed on the weather deck, because the height of the deck load would affect the stability of the vessel.



To load the ship for its sixth voyage defendant employed Portland. Defendant had concluded that the amount of cargo carried on previous trips was insufficient. On December 6, 1972, Captain A. B. McKimmey, manager of off-shore cargo operations for defendant, wrote a letter to the master of the PACKING, with a copy to Portland, which stated:

> "* * * When Weyerhaeuser Line first chartered the vessel, it was represented as having a carrying capacity of 4.5 million board feet of logs (Scribner scale).
>
> "To date, the largest load we have been able to put on board has been 4.1 million board feet which has not allowed full use of the vessel to SS charterers.
>
> "On this voyage we intend to full load the vessel to capacity to determine just how much of a load she will actually carry. Our object is to make use of all her cubic space under deck * * *.
>
> "Your cooperation with the Surveyors, Stevedores, and our Supercargo will be appreciated * * *."

The owner responded that carrying capacity is a function of the type of logs stowed as well as the method of storage and observed that the charter agreement was "* * * that you are to have full use of the cubic space under deck." Another representative of defendant rejoined that Captain McKimmey was "new to Weyerhaeuser" and "not entirely familiar with all the chartering arrangements," and that the original letter was "not intended to force a greater tonnage than we are allowed under our charter."[2]

The sixth voyage of the PACKING under the charter commenced with the loading of logs in Astoria, Oregon. The loading of the No. 1 hatch was deferred until the

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[2]As a consecutive voyage charterer under the terms of this particular charter-party, defendant vis-a-vis the longshoremen was in the same position as owner of the vessel. See note 1, ante.



vessel moved up the Columbia River to the Weyerhaeuser dock at Longview, Washington, in order to obtain a better selection of logs and use of a shoreside crane.

There were peculiar difficulties in the loading of the PACKING because of its outmoded design. On modern vessels designed for the stowage of logs, the hatch openings extend nearly the full length of the hatch. On the PACKING, converted as a log carrier, the hatch opening or "square" was considerably smaller than the hatch itself, creating a forward trunk (that part of the hatch forward of the square) of nearly 29 feet and an aft trunk of 24 feet. As in most log ships, there are no intermediate decks, and the hatch is open from the main deck to the ship's bottom, a depth of approximately 40 feet.

Because of the hatch configuration, stowed logs could not be butted tightly against the aft bulkhead because, as the longshoremen attempted to swing and land the load aft of the square, the slings used to carry the load would strike the hatch coaming.

The physical work of loading logs aboard the vessel, both at Astoria and Longview, was performed by Portland pursuant to its contract with defendant. The contract called for a "cost-plus, fixed-fee commodity rate." In other words, defendant was to pay the actual cost of labor in addition to a fixed fee determined by the quantity of stowage.

Loading operations commenced at Longview on December 20, 1972. Two Weyerhaeuser employes, a loading superintendent and a "supercargo," were in the vicinity during the loading. Supervisory



persons of Portland, also, worked on or about the ship. These were the stevedore superintendent, the "walking boss," and, below the "walking boss" in hierarchy, the gang (or "hatch") boss, who was the immediate supervisor of Shepler.

In an attempt to obtain a tight stow, the longshoremen were "dead-ending." Dead-ending involves securing a "wire" (cable) with a device called a "bear claw" to a stable object and running the wire under the material to be moved. By lifting the load with the crane, the load moves in the direction of the anchored end of the wire. By this method the longshoremen hoped to move logs from the center of the hold to the bulkheads and into the wings.

On December 21, 1972, the hold in Hatch No. 1 was partially loaded. A gap between the stow and the aft bulkhead had

developed due to the impossibility of butting the logs tightly against the bulkhead. This gap, or "hole," was approximately 26 feet deep, and the longshoremen climbed over and about the logs next to the hole in order to place the wire and bear claw and down over the ends to unfasten the wire and retrieve the bear claw from the anchoring logs.

Shepler was injured that afternoon while engaged in trying to retrieve a buried bear claw after a load of logs had been moved by dead-ending. Shepler fell and sustained head injuries, from which he died.

TRIAL RESULT

Two of plaintiff's several allegations of negligence were submitted to the jury; namely, that defendant was negligent: (a) in failing to "authorize"



the use of a bull winch[3] under the circumstances, and (b) in requiring the dead-ending of the log drafts. The case was submitted to the jury on special interrogatories, and the jury found that Shepler was not negligent and that defendant's negligence was 28% responsible for Shepler's death and Portland's negligence was 72% responsible.

SUFFICIENCY OF EVIDENCE

Defendant assigns as error the failure to grant its motions for involuntary nonsuit, for a directed verdict and to strike plaintiff's two specifications of negligence which were submitted to the jury. This requires us to determine

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[3]A bull winch (sometimes called a stowing machine or stowing winch) is a small gas double drum donkey set up on deck which supplies the power to utilize a system of pad eyes, blocks and lines in the hold to pull or "yard" the log ends up tight against the bulkhead.

whether there was sufficient evidence to submit the case to the jury upon those two specifications.

Neither party directs our attention to the scope of review which we exercise in a case arising under 33 USC, § 905(b). It could be argued that our scope of review is the same as that of a United States Court of Appeals reviewing a federal district court decision. If that were so, our task would be to determine whether as a matter of law the record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Marant v. Farrell Lines, Inc., 550 F2d 142 (3d Cir 1977), quoting from Denneny v. Siegel, 407 F2d 433, 439 (3d Cir 1969). On the other hand, if our scope of review is that we ordinarily exercise on appeal in actions on the law side of the court, we are



probably more limited. Since the verdict was for plaintiff, we could not find error in these respects unless we could affirmatively say there is no evidence to support the verdict.[4] Furthermore, we should be precluded from weighing the evidence and should be required to consider it in the light most favorable to plaintiff,[5] together with all inferences favorable to plaintiff which could be reasonably drawn from such evidence.[6]

We have concluded that under either test the evidence was sufficient to present a jury case, and, therefore, there was no error in this respect.

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[4]Oregon Constitution, Amended Art. VII, § 3.

[5]Myers v. Cessna Aircraft, 275 Or 501, 553 P2d 355 (1976).

[6]Jacobs v. Tidewater Barge Lines, 277 Or 809, 562 P2d 545 (1977).

The task of the jury, of course, is to weigh the evidence, judge the credibility of the witnesses and the reliability of their testimony, and to resolve all conflicts in the evidence. In performing that task in this case, the jury had before it evidence from which it could have found further facts in addition to the undisputed facts already discussed.

FURTHER FACTS

While the vessel was still at Astoria, defendant's loading superintendent told Portland's walking boss that the longshoremen were to work to get all available space full of logs. Defendant made the decision to use a shore crane rather than the ship's gear to load this hatch at Longview in an effort to get a tighter stow. Portland's superintendent was aware of Captain McKimmey's letter concerning a tight stow and that defendant wanted such



a stow in this hatch. Defendant's loading superintendent approached Portland's superintendent at Longview and asked if they could get "a real tight stow" on this hatch and what could be done to do so. Portland's man said, "If you want [a] real tight stow, the only way I know how is to put bull winches on there and pull them back to the bulkhead tight." Defendant's supercargo, also, told defendant's loading superintendent that the only way they could utilize the space in the hold "and abide by the instructions" was to use stowing winches. Portland's walking boss and the hatch boss, also, asked for bull winches at least once when both defendant's loading superintendent and supercargo were present. Portland's operations manager (the stevedore superintendent's superior) also spoke to both defendant's loading superintendent and Captain McKimmey

about the necessity of using bull winches to get a tight stow. McKimmey discussed the fact that this would entail extra cost.

Bull winches are no longer commonly used, because modern log vessels have large hatch squares with small wings and trunks, which permit logs to be landed in the hold without additional handling required to obtain an adequately tight stow. Portland had bull winches available, however, and they can be used safely if adequate precautions are taken. The use of bull winches would have been more costly to defendant because their use requires two extra longshoremen, one to serve as winch "driver" (operator) and the other as hatch tender to relay signals between the driver and the men in the hold as to the operation of the winch. This additional cost was discussed with defendant's loading superintendent.



After consulting with his supervisor in Tacoma, Washington, by telephone, defendant's loading superintendent informed Portland's personnel that defendant would not authorize the use of bull winches. The gang boss and the walking boss were told by defendant's representative that defendant "wanted a tight stow * * * no matter how long it took." On the following morning, December 21, Portland's hatch boss again tried without success to obtain authorization to use bull winches.

It is the supercargo's duty to supervise the loading of cargo in the sense of what cargo goes into which hold and in what order; however, he does not give orders to the longshoremen. Prior to the vessel's coming in, the supercargo was aware of Captain McKimmey's letter, and through it and orders from defendant's loading superintendent was aware that

defendant wanted to get more logs into the hold. The supercargo had discussed with defendant's loading superintendent the use of bull winches, but as above stated the latter's superiors would not authorize that use.

The supercargo ordered the length of logs to be brought shipside under the crane for lifting into the hold. The logs were brought by truck, and the logs in a load were not only of uneven length but, also, neither end of the load was even. This complicated the task of attempting to butt the log ends against the after bulkhead. The supercargo was not getting the logs he wanted from defendant's yard, and seeing that waste space was developing, he again discussed with his loading superintendent that they could carry out defendant's instructions only by using bull winches. The superintendent agreed to take



the matter up with his superiors and a short time later told the supercargo such use would not be authorized and that "we were to do the best we could with what we had."

As the work progressed and the hold began to fill "higher up," the more difficult it became to get the log ends close to the aft bulkhead because of lessening of space in which to swing the load. On the morning of the day Shepler fell, the supercargo told defendant's loading superintendent that it would be very difficult for the men to work under the conditions existing. A large, deep hole was developing as the stow rose higher in the hold. It was the biggest hole in a log stow the walking boss had ever seen, and the supervisor knew it to be unusually deep.

Although the Portland employes did not complain to defendant's employes that it was unsafe to achieve what defendant wanted without bulls, and although neither the loading superintendent nor the supercargo specifically ordered the longshoremen to dead-end; nevertheless, dead-ending was the only procedure feasible to attempt to carry out loading instructions in the absence of bull winches. Both the loading superintendent and supercargo were present at the hold from time to time and saw that the longshoremen were dead-ending, using the bear claw, and that the hole aft of the stow was being created. At least the supercargo, if not his superior, knew that dead-ending, which requires a man to work near the ends of wet logs and to go down to affix the wire with a bear claw, and later to remove it when jammed, is a "dangerous



procedure," in the supercargo's words. On the other hand, if bull winches were used, the stow would have been tight against the bulkhead, the hole would not have developed, and the men would have had no occasion to work at any deep hole at the ends of the logs. The absence of bull winches and the use of the technique of dead-ending combined to make both the loading procedure itself dangerous and to create a dangerous condition; namely, the hole. The hold thereby became a dangerous place to work.

This method of working log cargo is to be contrasted with a normal log loading operation, in which the longshoremen would merely land the logs and free the slings. Any space left over in the wings or trunks would be "blow" or waste space. Although holes do develop in these stows, there is little danger of falling into a

hole, as work is not done at the ends of the loads.

Although the longshoremen don't take orders from the supercargo, he has some responsibility. As he testified, "I think all supervisory personnel have a responsibility [for safety of personnel] of some type or another. You certainly don't want somebody doing anything unsafe if you see it."

Just prior to his fall, Shepler had climbed down over the ends of the logs between the stow and the bulkhead in an effort to free a jammed, or buried, bear claw. Despite wearing special shoes, he fell from the logs, which were wet from rain, and, although wearing protective headgear, he sustained head injuries which caused his death.



## THE LAW APPLICABLE TO A NEGLIGENCE ACTION UNDER § 905(b)

Prior to the 1972 amendments to LHWCA, there existed for some injured longshoremen what has been described as the "third-party circular liability lawsuit."[7] This was the result of two decisions (and their progeny) of the United States Supreme Court. In Seas Shipping Co. v. Sieracki, 328 US 85 (1946), the shipowner's absolute, non-delegable warranty of seaworthiness owed to seamen since The Osceola,[8] 189 US 158 (1903)

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[7]It has, also, been described as "triangular." See Ramirez v. Toko Kaiun K.K., 388 F Supp 644, 649 (DC ND Cal. 1974); Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F Supp 1224, 1228 (Dist. Ct.D.Ore 1975); 28 Hastings Law Journal 771 (1977).

[8]See, also, Mitchell v. Trawler Racer, Inc., 362 US 539 (1960), for proposition that due diligence by the shipowner will not discharge the duty to furnish a seaworthy vessel.

was extended to a longshoreman engaged in working the ship's cargo. In Ryan Co. v. Pan-Atlantic Corp., 350 US 124 (1956), the shipowner's right to indemnity from the longshoreman's employer (stevedore) was established where the unseaworthiness causing the injury was created by the stevedore's breach of its implied warranty to perform its services in a workmanlike manner; i.e., properly and safely.

The circularity of the lawsuit occurred thusly:[9] The longshoreman would sue the shipowner for damages for personal injuries resulting from the unseaworthiness of the vessel. If the unseaworthiness resulted from a breach of the steve-

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[9]We do not yet discuss for this background picture of the 1972 amendments that situation in which the longshoreman's recovery against the shipowner was based exclusively upon the latter's negligence. In such cases, of course, the Ryan doctrine was inapplicable.



dore's implied warranty to perform stevedoring services in a safe and workmanlike manner, the shipowner would either implead the stevedore or, after judgment for the longshoreman, seek indemnity from the stevedore. This "closed the circle" and resulted usually in the longshoreman receiving indirectly from the employer substantially more than the employer would have had to pay the longshoreman by way of benefits under LHWCA. This circularity did violence to the statutory scheme of LHWCA that the exclusive remedy of the injured longshoreman against his employer was for benefits under the compensation law.[10]

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[10]The employing stevedore did have a lien against the longshoreman's recovery for the amount of compensation benefits the employer had paid under LHWCA, and, thus, the plaintiff did not obtain a double recovery.

The thrust of the 1972 amendments was to trade a rather substantial increase in compensation benefits for the longshoreman's right to recover damages from the shipowner for personal injuries resulting from the unseaworthiness of the vessel. The injured longshoreman retained a right, however, to bring an action against the shipowner (the "vessel")[11] for injuries resulting from the latter's negligence. The operative section of LHWCA after the 1972 amendment is:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warrants to the

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[11]See footnote 1.



> contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. * * * The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." 33 USC § 905(b).

The amendment eliminates the longshoreman's strict liability remedy against the shipowner qua shipowner[12] and bars the shipowner from shifting his liability for his negligence to the stevedore. Thus, the circular liability lawsuit is laid to rest.

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[12]See Streatch v. Associated Container Transp. Ltd., 388 F Supp 935 (D.Cal.C.D. 1975) suggesting that the negligence remedy is to be taken as referring to the shipowner in his capacity as shipowner; therefore, the shipowner may also be vulnerable upon a strict liability theory as a products distributor.

It appears that we are the first state supreme court to be confronted with the task of divining the intent of Congress in the 1972 amendments[13] with respect to the nature of the shipowner's duty as distinguished from the standard of care imposed.[14] Some case law has now emerged through published decisions of the federal district courts and of the courts of appeal for the various maritime circuits;

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[13]We have already disposed of one appeal in a post-amendment case in Jacobs v. Tidewater Barge Lines, 277 Or 809, 562 P2d 545 (1977), but there the parties tried the case below on the basis of 2 Restatement (Second) of Torts , §§ 343 and 343A (1965); we were not, therefore, required to choose between conflicting contentions as to the nature of the duty and its source.

[14]See Theis, Amended Section Five of the Longshoremen's and Harborworkers' Compensation Act, 41 Tenn.L.R. 773, 780 (1974); but compare, Deacon, The Injured Longshoreman vs. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risks, 28 Hastings L.J. 771 (1977).



however, there is no consensus as to the point of departure for testing any given set of evidence to determine if it may yield findings of fact which would constitute negligence on the part of the shipowner. The standard of care, on its face, is that imposed by the statute; i.e., that old favorite, reasonable care, or what the reasonably prudent person would, or would not, do in the same or similar circumstances to avoid harm to others.[15] The nature of the duty is ignored, however, in the statute. The draftsman tells us only

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[15]"Negligence is conduct falling below the standard established for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do in the circumstances." Fleming, The Law of Torts, 3d ed, p. 111. But compare, Ehrenzweig, Negligence Without Fault (1951), questioning whether, despite lip service thereto, the courts are abandoning the constituent (to negligence) concepts of the "reasonable man" and his "foresight."

that the vessel owes to the longshoreman a duty to be careful. What precisely is required to discharge the duty does not appear from the statute.

No court which has seriously struggled with this problem has felt free to apply the statutory words as written. Every such court has gone to the legislative history as embodied in the House Report of the Education and Labor Committee, No. 92-1441, September 25, 1972, and the Senate Report of the Labor and Public Welfare Committee, No. 92-1125, September 14, 1972 (hereinafter the Reports). Our task is made more difficult by reason of the fact that some of the federal courts, in purporting to interpret or construe the statute in light of the language of the Reports, have chosen to ignore language in the Reports where such language is inconsistent with the result the court



apparently desires to reach in the given case. As a consequence, the federal court decisions are of help to us only in a very general way.

It is tempting to deal with this case under the words of the statute without resort to the Reports, and if all courts did so it would force Congress to "clean up its act." In other words, Congress should set forth in the statute itself several rules which now find expression only in the Reports. To be fair to the litigants before us and to those who may be coming before the trial courts, we shall do what has been done in each circuit and go to the Reports for guidance in ascertaining the nature of the duty of the shipowner to the longshoreman. We, therefore, now set forth those portions of the Reports which we deem pertinent to this discussion and to the decision of

this case. In doing so, we shall use the words of the Senate Report, because although the Reports are not identical we believe they do not conflict with each other in substance.[16] The Senate Report, therefore, in pertinent part is as follows:

> " * * * * *
>
> " * * * The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
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> " * * * * *
>
> "Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of

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[16]The House Report may be found at 3 United States Code Congressional and Administrative News, 92d Cong., 2d Sess., 4698-4720, with particular attention to pp. 4701-4705.



> employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.
>
> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like.
>
> "Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, Crumedy vs. The J. H. Fisser, 358 U.S. 423, Albanese vs. Matts, 382 U.S. 283, Skibinski vs. Waterman SS Corp. 330 [sic] F.2d 539; for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A.N.G. Stevedores vs. Ellerman Lines, 369 U.S. 355, Blassingill vs.

Waterman SS Corp., 336 F 2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship or ashore, Alaska SS Co. vs. Peterson, 347 U.S. 396, Italia Societa vs. Oregon Stevedoring Co., 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence.

"Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 [33 USC § 905] would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been



on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

"Under this standard, as adopted by the Committee, there will of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation--just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

* * * * * *

"Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the

law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable.

" * * * * * *."

Despite the fact that neither the statute nor the committee report anywhere contains any reference to the longshoreman as being a business visitor or invitee on the one hand or to the vessel or shipowner as being in a position equivalent to that of an occupier of land on the other hand, the majority of the courts have proceeded to analyze the nature of the duty as if it were mandated that 2 Restatement (Second)



of Torts, §§ 343 and 343A (hereinafter 343 and 343A), are applicable. We believe these courts to have been influenced largely by Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 41 Insurance Counsel Journal 63 (January 1974). Mr. Vickery is practicing in Houston, Texas, and according to biographical material accompanying his article, "He worked extensively with the Congress on the 1972 Amendments to the Longshoreman's Act as a representative of several Gulf Maritime and Steamship Associations." After first noting that:

> "Practitioners believe that the courts will apply 'land' concepts of negligence as against the shipowner and the admiralty concept of comparative negligence as

against the plantiff,[17] as the Congress intends [,] * * *"

he states, apparently without fear of contradiction: "The situation of the shipowner is comparable to that of a land owner or occupier of premises who contracts with an independent contractor to perform services on the premises." He then sets forth a description of the nature of the duty accompanied by copious citations. The seven "principles" which he advocates

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[17]It is interesting that the author speaks of applying the concept of comparative negligence as against the plaintiff. We had always assumed that comparative negligence under the general maritime law was something in favor of the plaintiff to ameliorate the harsh doctrine of contributory negligence existing at common law. Also interesting is the fact that the author ignores the committee reports' injunction that the defense of assumption of risk would not be available to the vessel. This is probably because the "principles" which he advocates as being applicable reintroduce the concept of implied assumption of risk.



as being applicable appear to be a paraphrase of 343 and 343A and comments thereto.

That 343 and 343A embody the concept (specifically forbidden by the Reports) of assumption of risk as a duty-limiting factor is apparent from comment e to 343A.[18] For judicial recognition of this point, see, for example, Brown v. Ivarans Rederi

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[18]"e. In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them."

A/S, 545 F2d 854 (3d Cir 1976) at page 863, n. 10.

Apart from the fact that description of the shipowner's duty by resorting to 343 and 343A introduces the forbidden element of assumption of risk, there is an additional fact even more important for rejecting application of those sections as the proper analysis. No one seriously disputes that the development of the law of torts, and particularly negligence concepts in the field of occupier of land vis-a-vis entrant upon the land, has been largely influenced by the favorable position which land and the rights of owners of land historically have held in English and American law. The scholars usually recognize and comment upon this situation at the outset of their discussions of this relationship:



"Responsibility for injury on dangerous premises has attracted its own, rather complex pattern of legal rules and withstood to a significant, if diminishing degree, the pervasive tendency to measure the existence and scope of duties of care by the broad standards of foreseeability of harm and reasonable conduct. Until well into the midst of the nineteenth century, the prominent social value attached to landholding defied all serious challenge to the claim by occupiers to untramelled use and enjoyment of their domain with least subordination to the interests of others. Qualified only by such concern for neighbours as exacted by the law of nuisance and trespass, the landowner was virtually immune to demands for the safety of persons who came upon his land, except not to injure them wilfully, set traps or use excessive force in expelling trespassers. With respect to the conditions of the premises, even a lawful visitor entered for all practical purposes at his own risk. Only belatedly and after protracted judicial groping did this singular tenderness for a sectional interest group begin to yield to the combined thrust of industrialization, with its attendant proliferation of physical dangers, and a growing sense of social responsibility. The eventual adjustment, however, continued to make substantial allowance to the lingering sentiment of the past by falling markedly

short of exposing occupiers to the full rigour of the developing negligence doctrine. Apprehensive of subjecting defendants to the uncontrolled arbitrament of unsympathetic juries, the new formula[1] ensured retention of a large measure of judicial control by the expedient of dividing persons entering land into distinct categories, fixed by reference to the purpose of their visit, with corresponding and precisely defined standards of care owed to each.

"This emphasis on categories and labels involves a high degree of formalism which experience has proved to be a fertile source of unrealistic distinctions, capricious results and all too many appeals on what should be questions of fact but are distorted into questions of law. In response to increasing dissatisfaction, drastic reform in England finally introduced a 'common duty' of reasonable care in favour of all lawful visitors alike.[2]

"[1]Enunciated by Willes J. in Indermaur v. Dames (1866) L.R. 1 C.P. 274 and Gautret v. Edgerton (1867) L.R. 2 C.P. 371.

"[2]Occupiers' Liability Act, 1957. See Street, chap. 10, sect. 2; Salmond, chap. 12; Odgers, [1957] Cam. L.J. 39; Payne, 21 Mod. L. Rev. 359."

[author's emphasis] Fleming, The Law of Torts 404, 3d ed. (1965).

To like effect, see Prosser, Law of Torts 351, 4th ed., Hornbook Series (1971), and



2 Harper and James, The Law of Torts 1430 et seq. (1956).

There is no indication whatsoever in the Reports that Congress intended that the land-based law to be applied was that of occupier and invitee. We regard as a premise, at least of the common law, that not only the existence but the nature of a duty arises out of some relationship of the parties; whatever the relationship between vessel and longshoreman may be, it is

not that of occupier of land and invitee.[19]

At the other end of the scale are those, including this plaintiff, who urge that we must apply maritime negligence law without any leavening by "land-based" concepts. At the extreme of this view is the position of Gilmore and Black,[20] who urge

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[19]For the purposes of this case, we need not reach the issue of general maritime law applicable to matters within the admiralty and maritime jurisdiction versus the common law. See U.S.Const. art III, § 2; Southern Pacific v. Jensen, 244 U.S. 205 (1917); "The Lottawanna," 21 Wall. 558 (1874); Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959), where the court stated: "The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts. * * * We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." pp. 630-32. It may well be in a case where necessary to do so this court or the United States Supreme Court will hold the last-quoted sentence to be the correct measure and nature of duty under the 1972 amendments.

[20]Gilmore and Black, The Law of Admiralty, 452-55, 2d ed. (1975).



that the concept of negligence which has been developed in seamen's actions under the Jones Act should be applied. The basis of their argument seems to be:

> "* * * that it makes sense for the shipowner to owe the same standard of care to commercial invitees like repairmen and longshoremen that he owes to crew members, and that a unitary standard of care would greatly simplify the law of the new negligence action." Robertson, "Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," pp. 449-50 Journal of Maritime Law and Commerce (April 1976).

Robertson notes that Benedict on Admiralty[21] disagrees with Gilmore and Black as to application of the Jones Act "standard" but that Benedict does predict the emergence of a "thoroughgoing and healthy negligence action" based upon general maritime principles. See, also, n. 19, ante, and accompanying text.

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[21]Benedict on Admiralty, 7th ed. Jhirad.

Decision of post-1972 amendment cases solely under the general maritime negligence law completely untrammeled by land-based common law concepts would fly directly in the face of the Reports and is no more warranted than is the action of those courts which have proclaimed that the shipowner no longer has any duty to furnish a safe place to work, thereby conveniently overlooking that which is plainly to be seen in the Reports. See the discussion of this aspect infra at page 34. We, therefore, reject that position urged by plaintiff.

The Third Circuit, in Hurst v. Triad, 554 F2d 1237 (3d Cir 1977) suggests that the nature of the duty is better described in terms of 2 Restatement (Second) of Torts, § 414. Chapter 15, Restatement (Second) of Torts, is concerned with the liability of an employer of an independent



contractor. Section 409 sets forth the so-called "general rule" that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. As indicated in comment b, however, the general rule is now primarily important only as a preamble to the catalog of its exceptions. The exceptions are contained in Sections 410-429, which make up the balance of Chapter 15. Sections 410 through 415 are exceptions based upon the employer's own conduct, while the exceptions in Sections 416 through 429 are based upon a theory of the employer's vicarious liability for the

tortious conduct of the independent contractor or his servarts.[22]

In Hurd [sic] the injured longshoremen urged that they were entitled to recover under the duty described in Section 414 on the theory that the shipowner had "ultimate control" over the stevedoring operations. Section 414 provides as follows:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise

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[22]The federal district court in Brown v. Ivarans Rederi A/S, 545 F2d 854 (2d Cir 1976), had instructed the jury pursuant to Section 416. The Court of Appeals rightly observed that this was improper because of the injunction in the committee reports against holding the shipowner vicariously liable for negligence of the stevedore. We observe that even here the statutory language as such would permit recovery against the shipowner vicariously. This is one more reason Congress should turn its attention to Section 905(b).



> reasonable care, which is caused by his failure to exercise his control with reasonable care."

The court rejected their contention on the bases: (1) that using the shipowner's ultimate control in order to create a duty of supervision would amount once again to the establishment of a non-delegable duty; (2) ultimate control over stevedoring operations is not the sort of control to which Section 414 is directed. For Section 414 to apply, the contractor must be controlled as to his methods of work or as to operative detail. The court then expressly approved the district court's analysis that Section 414 is part of the "federal common law" applicable to long-

shoreman suits against vessel owners under the 1972 amendments.[23]

Another court has recently considered the nature of the duty with some reference to Section 413, Restatement (Second) of Torts. In Munoz v Flota Merchante Grancolombiana SA, 553 F2d 837 (2d Cir 1977), the panel, speaking through Chief Judge Kaufman, held that the evidence was insufficient as a matter of law to make a question for the jury as to negligence of the

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[23]We can only believe a choice of the term "federal common law" was inadvertent. It has always been considered that although there may be a common federal law, there is no federal common law. "There is at least superficial incongruity in [the committee reports] calling for both land-based law and federal uniformity, as the traditional source of a federally uniform body of law in these matters has been the general maritime law. There is, as such, no federal common law." Robertson, "Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 7 J of Maritime L & C 447, 466 (April 1976).



shipowner. (The facts there are not particularly important for our discussion.) The court first stated:

> "The shipowner's responsibility for maritime accidents cannot follow from mere invocation, without more, of the talismanic claim of 'negligence.' * * *" p. 839.

The court recognized that it had applied 343A in an earlier Second Circuit case[24] where it was an open and obvious dangerous condition. In Munoz the court found that the shipowner had relinquished control of the hold, then in a reasonably safe condition, to an experienced stevedore, that the stevedore's negligence had created a latent dangerous condition which was

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[24]Napoli v. Hellenic Lines, Ltd., 536 F2d 505 (2d Cir 1976).

unknown to the owner,[24a] and that in such circumstances there was no jury case without risking return to the concept of liability without fault for shipowners, which Congress had rejected. The court stressed the fact that the work entrusted to the stevedore was "within its normal competence," indicating that by reason of that fact Section 413, Restatement (Second) of Torts was inapplicable. We might well question that, but it is unnecessary for our purposes to travel that pathway.

Inherent in the defendant's choice not to authorize the use of bull winches is an exercise of control of the method of work, if not indeed control as to opera-

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[24a] Compare this with the evidence from which the jury could have found in the case at bar that the defendant's representative, the supercargo, both knew of the condition created by the method of stow and admitted he recognized its danger to the longshoremen.



tive detail. Since, as we have already pointed out, the jury could have found that dead-ending was the only feasible alternative to the use of bull winches, it may also be inferred that dead-ending was "required" as a concomitant of defendant's injunction against using bull winches. Thus, the defendant also exercised in this respect control as to the method of work, if not the operative detail.[25]

In Brown v. Ivarans Rederi A/S, supra, the panel of the Third Circuit

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[25] We recognize this is not the same control over operative detail as existed in Butler v. O/Y Finnlines, Ltd., 537 F2d 1205 (4th Cir 1976), where the vessel's third mate was actually in the hatch supervising stowage to the extent of countermanding the manner in which a counterweight was to be stowed. Nevertheless, there was evidence as pointed out from which the jury could find that defendant controlled Portland as to Portland's methods of work in the two respects submitted to the jury. See also 2 Restatement (Second) of Torts § 414.

discussed some approaches to the analysis of the nature of the duty owed under Section 905(b) and concluded the opinion with a suggestion to the district court for retrial as to "the standard of care."[26] The Brown court concluded:

> " * * * It would appear that the principles of the law of negligence, as adopted in the admiralty field during the history of our court, are to form the basis of any recovery against shipowners insofar as such principles are not inconsistent with § 905(b)."

The utility of the suggestion is questionable, since what is consistent with § 905 (b) is the very object of the inquiry.

Since we predict that the United State Supreme Court will not in the relatively near future go so far as is

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[26]We do not wish to belabor the point unnecessarily, but we respectfully disagree that it is the standard of care as distinguished from the nature of the duty with which the courts must deal in applying § 905(b).



suggested by Professor Ehrenzweig in Negligence Without Fault (1951), and as yet has not adopted the thoroughgoing and healthy negligence action based upon general maritime principles predicted by Benedict (see note 21, ante, and accompanying text), we suggest the nature of the duty might well be that proposed in Heaven v. Pender, 11 Q.B.D. 503, 509 (1883):

> "Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Surely under that rule it would be a question for the jury as to whether negligence of the defendant was the cause of Shepler's death in this case. We need not adopt that rule, however, for disposition

of this case.

Under any duty thus far suggested by federal decisions, if the employer of an independent contractor dictates a particular method for performing the contracted work which is unreasonably dangerous to the workmen of the independent contractor, taking into consideration the possible alternative methods, he is responsible in damages for injuries caused to such workmen thereby. This is a duty to the employes of an independent contractor which is universally imposed upon the employer of such a contractor in any context, whether on land or at sea, and about which there can be no real argument. See Section 410 of Restatement (Second) of Torts, which provides:

> "The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders



> or directions negligently given by the employer, as though the act or omission were that of the employer himself."

Comment b, which concerns the extent of the rule, has the following to say:

> "This Section deals only with the liability of an employer who does not intend that the contractor shall cause physical harm to any other person, but who either employs a contractor to do work which, no matter how carefully done, involves an unreasonable risk of physical harm to others to whom he owes a duty to exercise care, or who employs a contractor to do work which could be safely done but for the fact that he directs the contractor to do it in a manner involving such risk. The liability is based upon the fact that the employer has been negligent in directing his contractor to do work which is dangerous in itself or in the manner in which it is done. Therefore, the employer is subject to liability, under the rule stated in this Section, for only such physical harm as is caused by the dangerous character of the work or the dangerous manner in which it is directed to be done. He is not subject to liability for any harm caused by some improper method which the

> contractor, without any direction of his employer, adopts in doing the work."

We do not hold that the duty of the owner or the charter of a vessel is limited to that set forth in Section 410, but do hold that his duty must go at least that far. That is all that is necessary for a decision in this case.

Defendant also assigns as error the court's instructing the jury that defendant owed a duty to provide a safe place to work. In this respect the complained-of portion of the court's charge is as follows:

> "When a charterer exercises control in whole or in part for stowing cargo, such a charterer has the duty to provide persons employed aboard a vessel with a reasonably safe place to work, in this case, within the allegations of negligence, that I am going to submit to you within those two allegations.
>
> " * * * * * *
>
> "If such negligence as alleged is proven to you by the



> plaintiff, this would render the charterer Weyerhaeuser liable for damages sustained by a workman injured or killed as a result of the charterer's failure to provide a safe place to work."

Apparently the "exception" to this charge was taken in the nature of a colloquy between defense counsel and the court in a pre-instruction conference:

> "THE COURT: * * * Any other instructions, exceptions other than what we have previously noted?
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> "MR. DAIGLE: Just briefly, your Honor. No. 4, your Honor, reads:
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> "'If such negligence as alleged is proven to you by plaintiff, this would render the charterer liable for damages sustained by a workman injured or killed as a result of the charterer's failure to provide a safe place to work.'
>
> "I don't think a charterer has the duty to provide a safe place to work. With reference to the previous Instruction No. 3, it says:
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> "'When a charterer exercises control in whole or in part for stowing cargo, such charterer has a duty to provide persons employed aboard a vessel with a reasonably safe place to work.'

"THE COURT: And I have added in within the allegations of negligence.

"MR. DAIGLE: Yes, sir. My point is that a charterer, in this case Weyerhaeuser, may very well -- I don't say they do, but assuming they exercise control over the loading operation for the first hour of the first day -- the way that instruction reads is that if Weyerhaeuser exercised control on the first part of the job, then they are liable for something that happened three days later after the first hour that complete control was turned over to the stevedore company.

"THE COURT: I tied that up. I understand. You have the exception. I did tie that up by saying it has to be there. The control aspects in those two aspects has to be the cause of the injury. That cures that. As I say, the reason I've been doing this I might say about 95 percent of the lawyers prefer they can say now the Judge will tell you this, I want to be sure and call your attention to the facts of this."

Immediately following the conclusion of the court's complete charge to the jury, counsel for the respective parties made oral argument. Insofar as the transcript reflects, no exceptions were taken to the



charge given either before or after the oral argument which followed the charge to the jury. Later the jury asked for reinstruction on certain points concerning the defendant maintaining any control or participating in the control of the loading of the vessel, and requested a restatement of instructions regarding the legal responsibilities of the men in the hold. In part, the court reinstructed the jury as follows:

"This is all true unless the charterer undertakes and exercises control in whole or in any material part for a particular operation and in this case it is a question of fact if the charterer Weyerhaeuser undertook to participate in the control of a particular loading style for this ship; that is, to load it in a particular manner.

"And it is a question of fact whether such loading would require either a bull winch operation of [sic] dead-ending of logs.

"When a charterer exercises control in whole or in part for stowing cargo, such a charterer has the duty to provide persons employed aboard a vessel with a reasonably safe place to work, in this case, within the allegations

of negligence. This means it is the duty of such a charterer to use reasonable care in order to avoid injury to a workman aboard the vessel in any situation in which it can reasonably be anticipated that a failure to use such care might result in such injury.

" * * * * *

"If such negligence as alleged is proven to you by plaintiff, this would render the charterer liable for damages sustained by a workman injured or killed as a result of the charterer's failure to provide a safe place to work."

To the complained-of portion of the charge, on reinstruction, defendant in its brief sets forth its "exception" as follows:

"The Court erroneously reinstructed the jury a second time on the same subject as revealed in the affidavit of Paul N. Daigle, correcting and supplementing the record on appeal:

"'I, PAUL N. DAIGLE, being first duly sworn, depose and say:

"'Approximately one hour after the jury requested to be reinstructed (Tr. pag. 611) I received a telephone call from Judge Jones who stated that the jury had requested to be reinstructed on the same matters set forth in their original request. At that point I stated



to Judge Jones I had no objections to his submitting the instructions in written form to the jury and I assume that he did so.' (Trial court file)"

We have grave reservations concerning the sufficiency of the "exceptions" here claimed. We believe it the better practice to take exceptions to instructions as given at an appropriate time after the charge rather than prior thereto. Next, we doubt that the "exception" purportedly taken by affidavit is any exception at all. In the interest of fairness, however, we shall consider these exceptions as if properly taken, assuming that the same exception as was taken to the instruction before the charge was given has been taken to the reinstructions.

The exception actually challenges the instruction on two grounds, the first being that the defendant had no duty to pro-

vide a safe place to work and the second being that the defendant had no duty to provide a safe place to work after relinquishing control of the vessel to the stevedore.

Whether the shipowner has a duty to provide a safe place to work has been somewhat puzzling to the federal courts. For instance, in Crowshaw v. Koninklijke Nedlloyd, B. V. Rijswijk, 398 F Supp 1224 (DC Or 1975), an early case arising after the 1972 amendments, the court at page 1229 asserts: "The shipowner does not owe the longshoreman a duty to provide him with a safe place to work." Compare this statement with language on page 1230: "Shipowners retain the initial obligation to provide invitees with a reasonably safe place to work." We believe that a fair construction of the Reports as a whole not only requires the shipowner to provide a reason-



ably safe place to work at the time the master stevedore and his employes board the vessel, but further to exercise ordinary care to maintain a reasonably safe place to work. Otherwise, the following language from the reports has no meaning whatsoever:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.
>
> "So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 [33 USC § 905] would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance

> had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances."

The duty thus embodied under the Reports is no more than that of any land-based person; namely, to provide a safe place to work for an independent contractor and his employes. On the other hand, it is clear from the Reports as a whole that the shipowner may delegate the duty to provide a safe place to work in all instances in which a land-based person might do so and, therefore, escape liability imposed vicariously although still being liable for his own negligence. Applying that construction to the exception here taken, we find the first ground of the exception to be erroneous and the second not to be valid because there was evidence from which the jury could find that the defendant was exercising control over the method of the



work and the instruction given by the court conditions the defendant's duty to provide a safe place to work upon a finding by the jury that the defendant was exercising such control. Furthermore, the obligation was limited by the court's charge to the two particulars of negligence submitted to the jury.

Defendant's assignment of error No. 1 follows:

> "The Circuit Court erred in refusing to rule as a matter of law that Plaintiff failed to prove liability against Defendant Weyerhaeuser Company, and in improperly instructing the jury in regard to Defendant Weyerhaeuser's liability."

This assignment of error was then broken down into 12 subdivisions. Apparently defendant itself believed that all of these 12 subdivisions were subsumed in one general question, for in stating the issues presented on appeal defendant set forth one general question to cover all 12 subdivisions:

> "(A) Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, does a voyage charterer who hires an independent expert stevedore to conduct loading operations owe any responsibility to provide a safe place to work or to warn[27] of open and obvious conditions to a longshoreman-stevedore's employee injured or killed during the loading?"

Our prior discussion has disposed of the first five subdivisions. The other seven are concerned with failure to give certain instructions requested by defendant. We have examined each of these and find that there was no error either because they were incomplete statements of the law, were erroneous under the nature of the duty we have concluded was owed, or were adequately covered in other portions of the court's charge.

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[27]Plaintiff did not charge defendant with a failure to warn Shepler of the condition in the hold, and our discussion of the nature of the duty under the evidence of this case shows that the giving of a warning does not in and of itself satisfy the duty owed.



OFFSET FOR STEVEDORE'S NEGLIGENCE

Defendant urges that should we uphold the verdict we should not uphold the judgment against defendant for more than 28% of the total damages awarded, on the basis that the jury found defendant to be only 28% negligent. Defendant would have us apply what has come to be known as the equitable credit doctrine. A fair exposition of the doctrine is as follows:

> "1. Plaintiff retains his no-fault compensation benefits in full.
> "2. His recovery against the shipowner is reduced by the percentage of his own negligence.
> "3. The shipowner's liability is reduced by the percentage of the stevedore's negligence, as well as that of the plaintiff.
> "4. The stevedore is not liable for damages because the Act limits his exposure to compensation payments. Furthermore, he may enforce his equitable lien against plaintiff's recovery from the shipowner. Because his own negligence has reduced plaintiff's recovery by [a percentage], however, his lien is diminished by the amount that percentage constitutes of the total judgment." Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, supra.

Application of the doctrine does have some appeal, but we decline to apply it in this case for the following reasons: (1) It appears to us to be exactly contrary to the Reports and would permit the shipowner in effect to obtain indemnity indirectly and to reduce the stevedore's lien against the compensation under the Act; (2) A majority of the federal courts of appeal which have considered the question have rejected application of the doctrine. Included in these are the Ninth Circuit. See Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir 1975), cert den 96 S Ct 1668 (1976). In the Fourth Circuit, which did apply the doctrine, there was a vigorous and able dissent by one of the three judges of the panel which heard the case. See dissenting opinion of Circuit Judge Hall, Edmonds v. Compagnie General Transatlantique, ____ F2d ____ (4th Cir



1977); (3) On the face of it it seems unfair to have the stevedore's percentage of negligence determined in a case in which the stevedore is not a party and has no power to control any portion of the presentation of evidence upon which the trier of fact assesses the stevedore's percentage of negligence of fault; (4) There is no assignment of error before us as to any ruling made by the trial judge upon this point. Insofar as we can tell from the record, the trial judge was not asked to do what defendant would now have this court do.

EVIDENCE AND THE FINANCIAL INTEREST OF PORTLAND

Defendant's second assignment of error is as follows:

> "The Circuit Court erred in preventing defendant Weyerhaeuser from demonstrating the bias and financial interest of Portland Stevedoring Company in the outcome of the present litigation."

Plaintiff called certain witnesses who at the time of Shepler's fall were regular employes of Portland. The trial judge prevented defendant, upon cross-examination of these witnesses, from showing that Portland had a financial interest in the outcome of the case as it pertained to Portland's lien against the recovery for compensation benefits paid to plaintiff. Plaintiff answers this assignment by stating there was no offer of proof as to what these witnesses would have said, and this court is therefore unable to determine what evidence might have been elicited and consequently cannot determine, even if there were error, whether it was prejudicial. It is doubtful whether an offer of proof is required where an objection is sustained upon cross-examination. See Arthur v. Parish, 15 Or 582, 47 P2d 682 (1935); Beemer v. Lenske, 241 Or 47, 402



P2d 90 (1965); and Stillwell v. S.I.A.C., 243 Or 158, 411 P2d 1015 (1966). Defendant did make an offer of proof by an attorney for Portland as to Portland's financial interest in any recovery by plaintiff. On the other hand, there is no offer of proof that the witnesses who had been employed by Portland would themselves be financially benefited by any recovery or failure of recovery in the case. The offer of proof by the attorney's evidence did not go to this point.

Although it is not applicable to this case, our own Workmen's Compensation Act expresses a legislative policy that in a third-party action the jury is not to be made aware that the plaintiff is entitled to workmen's compensation benefits. Furthermore, in Strandholm v. General Const. Co., 235 Or 145, 382 P2d 843 (1963), we affirmed the trial court in granting a

new trial after a defense verdict where the fact that plaintiff was entitled to benefits under LHWCA was deliberately disclosed to the jury by the defendant.

We are really dealing with a policy question concerning the collateral source doctrine, and this court has quite recently carefully considered the question. In Reinan v. Pacific Motor Trucking Co., 270 Or 208, 527 P2d 256 (1974), we noted:

> " * * * The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor. The evidentiary consequence of this rule is that proof of such payments is generally regarded as inadmissible in view of its potential misues by the jury." 270 Or at 213. [emphasis added]

We further noted: "[T]hat the likelihood of misuse by the jury clearly outweighs the value of this type of evidence and the



likelihood of an impermissible prejudicial impact on the jury's deliberations cannot be discounted." As a policy decision, we therefore continued our traditional adherence to the strict exclusionary rule. We decline to reexamine that decision on the record in this case.

Affirmed.

SUPREME COURT OF THE STATE OF OREGON

November 15, 1977

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Re: Shepler v. Weyerhaeuser Company, 279 Or 477

Gentlemen:

The court in retrospect believes that the opinion in Shepler v. Weyerhaeuser Company, 279 Or 477 at 500 (1977), was partially incorrect in the wording of footnote 23. Below is a substitute footnote 23, which will appear in the bound volume of the Oregon Reports:

> We believe the use of the term "federal common law" may be unfortunate. "There is at least superficial incongruity in [the committee reports] calling for both land-based law and federal uniformity, as the traditional source of a federally uniform body of law in these matters has been the general maritime law.



> There is, as such, no federal common law." Robertson, "Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," 7 J of Maritime L & C 447, 466 (April 1976). But see Erie R. Co. v. Tompkins, 304 US 64, 78 (1937): "There is no federal general common law." See also Jacobson v. Tahoe Regional Planning Agency, 558 F2d 928, 937 (1977).

Justice Tongue did not participate in this decision.

Very truly yours,

/s/ Loren D. Hicks
Loren D. Hicks
State Court Administrator

LDH:dj

APPENDIX C

Article III, § 2, cl. 1 of the United States Constitution:

"Jurisdiction of Courts

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.



28 U.S.C. § 1257(3):

"State courts; appeal; certiorari

"* * * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

28 U.S.C. § 2101(c):

"Supreme Court; time for appeal or certiorari; docketing; stay

" * * * * *.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."



APPENDIX D

33 U.S.C. § 905(b):

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship

building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

APPENDIX E

Restatement § 343:

"Dangerous Conditions Known to or Discoverable by Possessor

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and



should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger."

Restatement § 343A:

"Known or Obvious Dangers

"(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

"(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated."

## APPENDIX F

## EQUITABLE CREDIT COMMENTS

The legislative history of the 1972 Amendments does not directly come to grips with this particular problem, although one experienced maritime lawyer, who participated in the Congressional hearings, observes that the language "... the vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore," appears in the Committee reports and concludes:

> "It is apparent from this language that the Congress did not intend for the shipowner to be responsible for more than its proportionate part of a longshoreman's damages in a situation where the accident resulted from the concurrent negligence of the shipowner and the stevedore."

Vickery, E. D., "Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act 41 Ins.



C. J. 63 (Jan. 1974). Gilmore and Black remark:

> "... . ... if the Congress really meant that the 1% negligent shipowner should pay full damages to the injured worker and recover nothing from the 99% negligent employer, it might have said so more clearly." Gilmore & Black, The Law of Admiralty, (2d ed The Foundation Press, Inc., Mineola, N.Y. 1975) 452 § 4-1.

District Judge Skopil recognized this contention in Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224 (D. Or. 1975) and, although bound by a prior District decision, expressed approval of the equitable resolution proposed by J. Cohen and D. Dougherty, "'The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation.'" 19 N.Y.L.F. 587 (1974).

An excellent article discussing and analyzing the concept of crediting the shipowner with the amount of loss attributable to the stevedore's negligence appears in Coleman, Randall C. and Daly, Jr. Warren B., "Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act", 35 Maryland L. Rev. 351-411 (1976). See also Marant v. Farrell Lines, Inc., 550 F.2d 142 (3rd Cir. 1977).

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

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OCTOBER TERM, 1977

No. 77-823

---

WEYERHAEUSER COMPANY, a Washington corporation,

Petitioner,

v.

PATRICIA ANN SHEPLER, Individually and as Personal Representative of the Estate of Oren D. Shepler, Deceased,

Respondent.

and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,

Defendant.

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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# S U B J E C T  I N D E X


Page

Reasons Why The Writ Should Not Be Granted . . . . . 1

Conclusion . . . . . 14


# T A B L E  O F  A U T H O R I T I E S

## CASES


Albert v. Paulo, 552 F.2d 1139 (CA 5, 1977) . . . . . 14

Anderson v. Iceland Steamship Co., 431 F.Supp. 869 (D. Mass.,1977). 4

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (CA 3,1976) . . . . . 4

Butler v. O/Y Finnlines Ltd., 537 F.2d 1205 (CA 4,1976). . . . . 4

Dodge v. Mitsui Shintaku Ginko, KK Tokyo, 528 F.2d 669, (CA 9, 1976), cert den 425 U.S. 944 (1976) . . . . . 13

Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186 (CA 4, 1977) . . . . . .12,14

Hartford Life Ins. Co. v. Johnson, 249 U.S. 490 (1919). . . . . 13

Hurst v. Triad Shipping Co., 554 F.2d 1237 (CA 3, 1977) . . . . . 4

Julien v. Lykes Bros. Steamship Co., 1977 AMC 241 (E.D. La., 1976) . . . . . 4

Landon v. Leif Hoegh & Co., 521 F.2d 756 (CA 2, 1975), cert den sub nom A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053, reh den 424 U.S. 935 (1976). . . . . 13

Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975), cert den 425 U.S. 936, 96 S.Ct. 1668 (1976) . . . . . .11,13

OTHER AUTHORITIES

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) 2

I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

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and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,

Defendant.

---

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Reasons Why The Writ
Should Not Be Granted

This is not an appropriate case for certiorari, either to determine the scope

of duty owned by shipowners or charterers to longshoremen under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), or to consider whether a longshoreman's third party recovery should be reduced by the negligence of his stevedore employer under a so-called "equitable credit" or "Murray credit" rule.

The record below is not an appropriate vehicle for consideration of either of these issues. The Petitioner (hereafter, "Weyerhaeuser") retained active control over the loading of the vessel which it had chartered, and its refusal to authorize the use of safe loading equipment was responsible for Mr. Shepler's death. As the decision of the Oregon Supreme Court accurately states:



> "Under any duty thus far suggested by federal decisions, if the employer of an independent contractor dictates a particular method for performing the contracted work which is unreasonably dangerous to the workman of the independent contractor, taking into consideration the possible alternative methods, he is responsible in damages for injuries caused to such workman thereby. This is a duty to the employees of an independent contractor which is universally imposed upon the employer of such a contractor in any context, whether on land or at sea, and about which there can be no real argument." (Petition, A-62.)

There is no conflict among the Circuit Courts of Appeal with respect to a tortfeasor's liability for the kind of negligent conduct involved in this case. All of the federal decisions which have construed the 1972 amendments to the LHWCA are in agreement that a shipowner's active participation in loading or unloading a

vessel subjects him to liability for injury attributable to his own negligent acts or omissions. Butler v. O/Y Finnlines Ltd., 537 F.2d 1205 (CA 4, 1976); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (CA 3, 1976); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1251-1252, ftn. 39 at 1252 (CA 3, 1977); Anderson v. Iceland Steamship Co., 431 F. Supp. 869 (D. Mass., 1977); Julien v. Lykes Bros. Steamship Co., 1977 AMC 241 (E.D. La., 1976).

Weyerhaeuser is a lumber and logging company which operates a huge mill and port facility at Longview, Washington. In 1972, Pacific Coast Shipping Co. and Weyerhaeuser executed a "Beizai (American Logs/Lumber)" voyage charter of the vessel PACKING under the terms of which Weyerhaeuser retained authority to "load,



stow and discharge the cargo free of risks and expenses to owners." (Pl.Ex.12; Tr.72-75) Weyerhaeuser hired a master stevedore to do the actual work of stowing logs, but had both a loading superintendent and a supercargo working about the vessel, and these supervisory employees exercised actual control over the selection of logs and method of loading (Tr.49, 530, Def. Ex.44, 432-435, 178-188, 194, 440-443, 229).

Longshoreman Oren Shepler was killed aboard the PACKING at Weyerhaeuser's Longview dock during a voyage of the vessel PACKING under the Beizai charter. During that voyage, Weyerhaeuser experimented with stretching the log-carrying capacity of the PACKING beyond previous limits (Tr.75, 76; Ex. 13-16; Tr.75-90, 111-112, 179-180, 435).

Weyerhaeuser's insistance upon a full stow was complicated by the problem that on the vessel PACKING, unlike most modern log ships, the No. 1 hatch opening (or "square") was much smaller than the fore and aft dimensions of the hatch itself, which made it difficult to stow logs under deck (Tr.113-114, 211, 221, 229, 232, 335, 453, 113, 235, 337, 188). Moreover, the logs supplied by Weyerhaeuser from its Longview log yard were of the wrong length for the hatch (Tr.118, 182, 183, 454-455).

Because of the conditions created by the shape of the hatch, the uneven logs, and Weyerhaeuser's insistance upon a full stow with no waste space, the only adequate method of accomodating Weyerhaeuser's demands was to use a stowing machine (or "bull winch")(Tr.112-113,



116-117, 230, 234, 235, 238, 239, 336, 337). A bull winch (which is a small "donkey" engine designed to pull logs about in a hold), would have required more manpower and would have increased Weyerhaeuser's cost of loading the vessel (Tr.116, 239). A stevedore vice president called Weyerhaeuser's manager of cargo operations, requested permission to use bull winches, and discussed the extra cost, after which Weyerhaeuser vetoed their use (Tr.116-117, 525-526, 182-183, 238-239, 336, 337).

Longshoremen were then compelled to stow logs into the No. 1 hatch of the vessel as best they could without stowing machinery, which caused a hole approximately 28 feet deep to develop between the aft bulkhead and load of logs (Tr.114, 337,

169, 347). Because of Weyerhaeuser's insistance on a tight stow, longshoremen were required to work near the hole using a procedure known as "dead-ending." While Shepler was engaged in this procedure, he slipped, fell to the bottom of the hold, and was killed (Tr.117-118, 313, 443-444, 241-242, 255-258, 297-302, 242, 311-318, 217-219, 365).

All of this work went forward with the knowledge and participation of Weyerhaeuser's loading superintendent and supercargo. Weyerhaeuser's supercargo testified that if it had not been for Weyerhaeuser's insistance upon a tight stow, the longshoremen need not have worked about the open hole (Tr.183, 184), and that the hole could have been filled if stowing winches had been used (Tr.183,



184). Weyerhaeuser's loading superintendent and supercargo both admitted that they knew of the hole between the stow and the aft bulkhead and that longshoremen were dead-ending logs (Tr.184, 448, 456, 460), a procedure which the supercargo conceded was dangerous (Tr.184), but which many witnesses testified was necessary in view of Weyerhaeuser's insistance upon a tight stow (Tr.118, 184-195, 228, 235-239, 313, 321).

Weyerhaeuser's active supervision of the work, its refusal to authorize the use of safe equipment, and its insistance that longshoremen provide a tight stow even though this could not be done safely with the tools available, constituted misconduct which would be actionable under <u>any</u> view of maritime negligence,

and presents no issue which merits review by this Court.

Petitioner's further request that this Court grant certiorari to determine the applicability of a so-called "equitable credit" or "Murray credit" to reduce respondent's recovery by the percentage in which the stevedore employer was negligent, finds no support in the record. Weyerhaeuser failed to raise the issue in the trial court, a fact reflected in the record and conceded by Weyerhaeuser's counsel on oral argument before the Oregon Supreme Court. Normally, application of an "equitable credit" doctrine would deny the stevedore employer recovery of its workman's compensation lien. Not only did Weyerhaeuser fail to raise the defense of "equitable credit" in the trial court, it failed to give the decedent's



stevedore employer any notice of such a defense, in order that the employer might be joined as a party or petition for intervention to protect its interests.

Under such circumstances, the Oregon Supreme Court declined, upon adequate state grounds, to apply an "equitable credit" defense. That court held:

> "***[W]e decline to apply [the equitable credit doctrine] in this case for the following reasons: (1) It appears to us to be exactly contrary to the Reports and would permit the shipowner in effect to obtain indemnity indirectly and reduce the stevedore's lien against the compensation under the Act; (2) A majority of the federal courts of appeal which have considered the question have rejected application of the doctrine. Included in these are the Ninth Circuit. See Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert den 96 S Ct 1668 (1976). In the Fourth Circuit, which did apply the doctrine, there was a vigorous and able dissent by one of the

three judges of the panel which heard the case. See dissenting opinion of Circuit Judge Hall, Edmonds v. Compagnie Generale Transatlantique, ___ F2d ___ (4th Cir. 1977); (3) On the face of it it seems unfair to have the stevedore's percentage of negligence determined in a case in which the stevedore is not a party and has no power to control any portion of the presentation of evidence upon which the trier of fact assesses the stevedore's percentage of negligence or fault; (4) There is no assignment of error before us as to any ruling made by the trial judge upon this point. Insofar as we can tell from the record, the trial judge was not asked to do what defendant would now have the court do." (Petition, A76, 77)

It would be contrary to the practice of this Court to grant certiorari where the decision below is based upon adequate state grounds.[1/] Nor will this Court

1/ Mr. Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Ass'n Quarterly, 393, 399-400 (1960).



grant certiorari to review a federal claim arising in a state court proceeding where the highest court of that state has held, in good faith, that the claim was not timely asserted. Hartford Life Ins. Co. v. Johnson, 249 U.S. 490 (1919).

Moreover, there is no present conflict among the Circuit Courts of Appeal on the "equitable credit" or "Murray credit" issue. The Second, Fifth and Ninth Circuits have rejected the defense, and this Court has several times denied certiorari to review the question. Landon v. Leif Hoegh & Co., 521 F.2d 756 (1975), cert den sub nom A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053, reh den 424 U.S. 935 (1976); Dodge v. Mitsui Shintaku Ginko, KK Tokyo, 528 F.2d 669 (CA 9, 1976), cert den 425 U.S. 944 (1976); Shellman v. United States Lines, Inc., 528 F.2d 675 (CA 9, 1975),

cert den 425 U.S. 936 (1976); Albert v. Paulo, 552 F2d 1139 (CA 5, 1977). A form of "equitable credit" was approved by a three judge panel of the Fourth Circuit in Edmonds v. Compagnie Generale Transatlantique, 558 F2d 186 (CA 4, 1977), (with one judge dissenting), but the Fourth Circuit has granted a rehearing and no decision has yet issued.

## Conclusion

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANK POZZI
RAYMOND J. CONBOY

Attorneys for Respondent

Supreme Court, U. S.
FILED
JAN 17 1978
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IN THE SUPREME COURT OF THE UNITED STATES

NO. 77-823

OCTOBER TERM, 1977

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PLAINTIFF-RESPONDENT,

v.

WEYERHAEUSER COMPANY, A WASHINGTON CORPORATION,
DEFENDANT-APPELLANT-PETITIONER,

and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,
DEFENDANT-RESPONDENT.

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# PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS


| | Page |
|---|---|
| Summary of Argument..... | 1 |
| Reply to Respondent's Statement of Reason Why Writ Should Not Be Granted | |
| 1. The Oregon Supreme Court Misconstrued the Shipowner's Standard of Care and Applied a Rule in Direct Conflict With Most Federal Decisions. | 2 |
| 2. Weyerhaeuser Properly Raised the Question of the Equitable Credit Doctrine in the State Trial Court..... | 9 |
| Conclusion..... | 12 |


INDEX OF AUTHORITIES

Cases


| | |
|---|---|
| Westcott v. Impresas Armadores, S. A. Panama, 564 F2d 875 (9th Cir. 1977) | 2,3,5,9 |

IN THE SUPREME COURT OF THE UNITED STATES

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DEFENDANT-RESPONDENT.

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# PETITIONER'S REPLY BRIEF

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## SUMMARY OF ARGUMENT

The Oregon Supreme Court misconstrued the duty owed by a charterer or shipowner and rendered a decision in direct conflict with most Federal cases, particularly the recent apposite case of Westcott v. Impresas

Armadores, S.A. Panama, 564 F2d 875 (9th Cir. 1977). Contrary to plaintiff's assertion, Weyerhaeuser took no active role in the loading; instead, it relied upon the expertise of the stevedore.

Weyerhaeuser properly raised the question of the application of the equitable credit doctrine in the state trial court by an initial pleading (struck on plaintiff's motion) and by unchallenged request for submission of the case to the jury on special verdict by interrogatories.

## REPLY TO RESPONDENT'S STATEMENT OF REASON WHY WRIT SHOULD NOT BE GRANTED

1. The Oregon Supreme Court Misconstrued The Shipowner's Standard of Care and Applied a Rule in Direct Conflict With Most Federal Decisions.

Plaintiff asserts erroneously:

> "There is no conflict among the Circuit Courts of Appeal with respect to a tortfeasor's liability for the kind of negligent conduct involved in this case. All of the federal decisions which have construed the 1972 amendments to the LHWCA are in agreement that a shipowner's active participation in loading or unloading a vessel subjects him to liability for injury attributable to his own negligent acts or omissions. ..." (Resp. Br. pp. 3-4).



Contrary to plaintiff's contentions, Weyerhaeuser took no active role in loading the M/S PACKING, and the decision of the Oregon Supreme Court on this issue of substantial and recurring federal importance conflicts with a number of well-reasoned Federal cases including Wescott v. Impresas Armadores, S.A. Panama, 564 F2d 875 (9th Cir. 1977) (hereinafter referred to as "Wescott"), a recent Federal case arising in Oregon.

Wescott, supra, involved injuries sustained by a longshoreman (employed by an independent stevedore) during the loading of two kinds of wheat. The stevedore

superintendent suggested a sloping separation whereby the first type of wheat is poured into the hatch, runs to a natural angle of repose, and is covered by a burlap material before the second load descends. The ship's master objected and requested a flat separation which required leveling the first type of wheat before placement of the burlap and loading of the second type of wheat. The master did not instruct the stevedore how to achieve the leveling. The stevedore, in its expertise, chose to employ a "panning" method, using a heavy curved metal pan controlled by taglines to level the cargo. Plaintiff, an experienced longshoreman, suffered injuries occasioned by the panning method; he contended that the ship (by reason of its construction) lacked appropriate fixtures for attachment of the taglines, and this defect caused him harm. At no time did the stevedore



or longshoremen ever advise the shipowner that a flat separation might cause harm to men in the hold. The Ninth Circuit, shortly after the decision was rendered in the case presently before this Court, held that the shipowner was entitled to a directed verdict under these facts and reversed the district court judgment for the longshoreman.

Wescott, supra, presents facts squarely apposite to the present case and points up the conflict engendered by the Oregon Supreme Court decision.

Mr. Shepler sustained injuries during the loading process while employed by an independent expert stevedore (Ex. 44; Tr. pp. 488-489, 500). The charterer requested a tight stow (Ex. 13; Tr. pp. 75-78, 490) and declined to authorize bull winches; no one told Weyerhaeuser that failure to use bull winches would result in a safety haz-

ard (Tr. pp. 140, 160, 198, 341, 440, 527, 529). In fact, the stevedore could have employed bull winches if, in its expertise, it determined their use appropriate and necessary (Tr. p. 504). The expert longshoremen (including Mr. Shepler, Tr. p. 225) decided to "dead end" the logs (Tr. pp. 267, 327) without any request or direction from the charterer; Weyerhaeuser never advised the longshoremen how to load the logs in the hatch (Tr. pp. 288, 480, 486). By reason of the method chosen by the longshoremen, and the obvious configuration of the hatch (Resp. Br. p. 6), the crevasse developed adjacent to the aft bulkhead (Tr. pp. 154, 173).

Plaintiff mistakenly argues that the two Weyerhaeuser employees near the job - the superintendent and the union supercargo - ". . . exercised actual control over the selection of logs and method of



loading . ... " (Resp. Br. p. 5). To the contrary, their presence does not constitute direction, control or active participation in the loading, any more than the nature of the cargo (length of log drafts) caused a loss which should be visited upon Weyerhaeuser. Weyerhaeuser employs a union member, Mr. Pitzer, as supercargo to oversee its interests in loading (Tr. pp. 178, 485-486). Mr. Pitzer acts in a record-keeping capacity and orders logs from the log yard in accordance with the specifications of the Japanese buyers (Tr. pp. 136, 291-292, 467, 475, 485-486). He advises the stevedore walking boss of the nature of the cargo and the appropriate hatch, leaving it to the walking boss and hatch boss how to load the cargo (Tr. p. 344). Mr. Pitzer neither serves as a safety engineer (Tr. p. 447) nor tells the longshoremen

how to load the logs (Tr. p 344, 480, 486). He did not direct Mr. Shepler to climb down the stow (Tr. p 200). He acts as the first line of union employee, carries out Weyerhaeuser instructions that cargo be loaded, and works with Weyerhaeuser personnel in preplanning the stow (Tr. pp 485-486, 502).

Mr. Wilson's duty amounts to acting as loading superintendent (Tr. p 434): he receives purchase orders and, with the assistance of the supercargo, assigns the logs to the appropriate vessel (Tr. pp 434, 485-486). He did not advise or direct the stevedore gang boss how to load the logs, but left that function to the stevedore (Tr. pp 288, 480, 486). He merely relayed his superior's directions to the ship and stevedore to fill all available space with cargo (Tr. p. 3320. The stevedore chose the method to achieve



a tight stow; Weyerhaeuser is entitled to assume an expert will pick a safe means of performance, even if it knows of the manner of performance. Wescott, supra.

2. Weyerhaeuser Properly Raised The Question of the Equitable Credit Doctrine in The State Trial Court.

Weyerhaeuser does not concede that it failed to raise the issue of equitable credit below (Resp. Br.p 10). The issue of the stevedore's responsibility was raised by Weyerhaeuser's initial pleading and by the submission of a special interrogatory form of verdict.

Weyerhaeuser raised this issue when it affirmatively pleaded the following defense at the outset:

> "THIS ANSWERING DEFENDANT FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE ALLEGES:
>
> "I
>
> "Incorporates herein as though fully stated herein this answering defendant's first affirmative answer and defense.

"II

"That OREN LEE SHEPLER was an employee of Portland Stevedoring Company on or about the 21st of December, 1972, and his employer was in control and charge of the loading of the vessel and was in control and charge of OREN LEE SHEPLER and that if SHEPLER died as the result of the negligence of anyone, it was the negligence of his employer, Portland Stevedoring Company." (Trial court file.)

Plaintiff moved against defendant's answer and the Circuit Court struck the language as subject to proof under a general denial (trial court file). Plaintiff should not be heard to assert "waiver" in these circumstances, where she precluded the defense in the pleading stage.

On trial, defense counsel requested submission of the special verdict by interrogatory form to the jury and advised the trial judge of the necessity for such a verdict in order to eliminate the need for a new trial to determine the



application of the equitable credit doctrine. The record does not indicate any objection to the special verdict by plaintiff, nor does plaintiff advise the court of any additional procedural means necessary to preserve the issue for appeal.

## CONCLUSION

Because this petition raises two undecided federal questions -- the shipowner's duty under the 1972 Amendments, and the appropriateness of the equitable credit doctrine -- this court should grant this petition and hear the case on the merits.

Respectfully submitted,

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